14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]247

JAMES J. BROUGHAM AND ARTHUR N. STANKEY,
APPELLANTS,

vs.

BLANTON MANUFACTURING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 16, 1917.

(26096)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 629.

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vs.

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INDEX.

	Original.	Print.
Caption	a	a
Transcript of record from the District Court of the United States for the Eastern District of Missouri	1	1
Citation and acknowledgment of service	1	1
Caption of transcript from U. S. District Court	1	1
Bill of complaint	2	2
Plaintiff's trade-mark of "Creamo" oleomargarine	5	5
Exhibit A, letter, Jas. J. Brougham, inspector in charge, to Shepard Barclay, February 10, 1914	11	11
Exhibit B, letter, Jas. J. Brougham, inspector in charge, to the Blanton Co., July 8, 1912	12	12
Subpœna in chancery and marshal's return	12	12
Order, application for issuance of temporary injunction set down for hearing	13	13
Order to show cause	13	13
Order of submission	14	14
Separate answers of the defendants, Brougham and Stankey	14	14
Memorandum opinion of the District Court	19	19
Final decree, May 13, 1914	20	20
Order allowing time to present bill of exceptions, etc	21	21
Petition for appeal, etc	22	22
Order allowing appeal	22	22
Assignment of errors	23	23
Order, November 10, 1914, extending time to present bill of exceptions	24	24

	Original.	Print.
Transcript of record from the District Court of the United States for the Eastern District of Missouri—Continued.		
Order, November 30, 1914, extending time to file transcript	25	25
Order, January 13, 1915, extending time to file transcript	25	25
Order, January 13, 1915, extending time to present bill of exceptions	25	25
Præcipe for transcript on appeal	26	26
Election as to printing of transcript	26	26
Order, March 10, 1915, extending time to file transcript	26	26
Order, March 10, 1915, extending time to present bill of exceptions	26	26
Order, April 15, 1915, extending time to file transcript	27	27
Order, April 15, 1915, extending time to present bill of exceptions	27	27
Order, June 9, 1915, extending time to present bill of exceptions	27	27
Bill of exceptions	27	27
Caption	27	27
Testimony for plaintiff	28	28
Plaintiff's exhibits	29	29
Letter, J. W. Yerkes, commissioner, to Ben Westhus, collector, etc., January 19, 1904	29	29
Letter, Rice P. Steddom, Chief Inspection Division, to Dr. J. J. Brougham, April 4, 1907	30	30
Letter, Jas. J. Brougham, veterinary inspector, to the Blanton Co., May 24, 1907	30	30
Letter, Rice P. Steddom, Chief Inspection Division, to Dr. Jas. J. Brougham, May 22, 1907	31	31
Portions of trade-label for oleomargarine of Blanton Co.		
Testimony of David A. Blanton	33	33
Plaintiff's exhibits	39	39
Letter, Rice P. Steddom, Chief Inspection Division, to Dr. J. J. Brougham, April 26, 1911	39	39
Letter, Jas. J. Brougham, inspector in charge, to the Blanton Co., April 28, 1911	39	39
C, label of the Blanton Co.	40	40
Trade-mark No. 69352 to Blanton Manufacturing Co., June 9, 1908	47	47
I, letter, Chief Meat Inspection Bureau, to the Blanton Co., April 26, 1913	52	52
J, letter, chief of bureau to the Blanton Co., October 2, 1912	52	52
K, letter, Jas. J. Brougham, inspector in charge, to Shepard Barclay, February 10, 1914	53	53
L, reading matter upon carton of Blanton Co.	55	55
Defendants' exhibits	60	60
3, letter, Chief Meat Inspection Bureau, to the Blanton Co., May 31, 1913	60	60
4, letter, Chief Meat Inspection Division, to the Blanton Co., June 20, 1913	61	61
5, letter, Chief Meat Inspection Division, to the Blanton Co., October 27, 1913	61	61
6, letter, Acting Chief of Bureau, to the Blanton Co., January 31, 1914	62	62
Letterhead of the Blanton Co.	65	65
Plaintiff's Exhibit, letter, the Blanton Co. to Bureau of Animal Industry, May 20, 1913	66	66
Testimony of J. F. Oberwinder	68	68

	Original.	Print.
Transcript of record from the District Court of the United States for the Eastern District of Missouri—Continued.		
Bill of exceptions—Continued.		
Testimony for plaintiff—Continued.		
Testimony of Bruce Dougan	69	69
Testimony of Frederick A. Southwick	70	70
Testimony of Walter Edwards	72	72
Testimony for defendants	75	75
Section 8 of regulation No. 3 of Department of Agriculture	75	75
Regulation 18 of Department of Agriculture	75	75
Testimony of James J. Brougham	78	78
Letter, Jas. J. Brougham, inspector in charge, to Shepard Barclay, February 10, 1914	79	79
Defendants' exhibits	84	84
1, Reading matter upon "Creamo Oleomargarine" carton of the Blanton Co.	84	84
2, "Creamo Brand" label of the Blanton Co.	85	85
3, letter, Chief Meat Inspection Division, to the Blanton Co., May 31, 1913	85	85
4, letter, Chief Meat Inspection Division, to the Blanton Co., June 20, 1913	86	86
5, letter, Chief Meat Inspection Division, to the Blanton Co., October 27, 1913	86	86
6, letter, Acting Chief of Bureau, to the Blanton Co., January 31, 1914	87	87
Testimony for plaintiff in rebuttal	88	88
Testimony of David A. Blanton	88	88
Recital that record contains all of the testimony	88	88
Recital of finding of issues for the plaintiff, of entry of final decree, etc., and of orders extending time to file bill of exceptions	88	88
Certificate of judge to bill of exceptions, etc.	89	89
Clerk's certificate to transcript	90	90
Appearance of counsel for appellants	91	91
Appearance of counsel for appellee	91	91
Order of argument	91	91
Order of submission	92	91
Opinion, U. S. Circuit Court of Appeals	93	92
Decree, U. S. Circuit Court of Appeals	103	99
Petition for appeal to Supreme Court, U. S.	103	99
Assignment of errors on appeal to Supreme Court, U. S.	104	100
Order allowing appeal to Supreme Court, U. S.	106	101
Citation on appeal to Supreme Court, U. S., and acknowledgment of service	108	102
Clerk's certificate to transcript	109	102

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1917, of said court before the Honorable Walter H. Sanborn and the Honorable Walter I. Smith, circuit judges, and the Honorable Charles F. Amidon, district judge.

Attest:

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: On the first day of October, A. D. 1915, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein James J. Brougham and Arthur N. Stankey were appellants and Blanton Manufacturing Company was appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 (Citation.)

The United States of America to Blanton Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an order granting an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein James J. Brougham and Arthur N. Stankey are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said order of appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this 20th day of October in the year of our Lord one thousand nine hundred and fourteen.

DAVID P. DYER,
United States District Judge,
For the Eastern District of Missouri.

Due service of the foregoing citation is hereby acknowledged this 20th day of October, 1914.

SHEPARD BARCLAY,
Of Attorneys for Blanton Mfg. Co., Complainant.

2 Endorsed: Filed in the District Court on Nov. 4, 1914.

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3 United States of America,
Eastern Division of the Eastern Judicial District of Missouri—ss.

In the District Court of the United States, in and for said division of said district.

Be it remembered, that heretofore to-wit on the twenty-fourth day of February, in the year of our Lord, One Thousand Nine Hundred and Fourteen, there was filed in the office of the Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a certain Bill of Complaint, in cause numbered 4262, wherein Blanton Manufacturing Company is complainant, and James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston are Defendants, which said bill of complaint is in words and figures as follows, to-wit:

4

Bill of Complaint.

In the District Court of the United States
In and for the Eastern Division of the
Eastern Judicial District of Missouri.

September Term, 1913.

Blanton Manufacturing Company, Plaintiff,

vs.

James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston, Defendants.

In Equity, No. 4262.

Eastern Division of the Eastern Judicial District of Missouri—ss:

To the Honorable, the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and to each of the Honorable, the Judges thereof:

The plaintiff, your orator, Blanton Manufacturing Company, a corporation, by its solicitors, complains of said defendants, of a wrong and injury arising under the Constitution and laws of the United States within the jurisdiction of this Court whose remedial process plaintiff invokes by this suit in Equity, praying proper relief appropriate to the facts, that is to say:

First. Plaintiff, your orator, respectfully states that it is the Blanton Manufacturing Company, and since the 5th day of November, A. D. 1904, it has been and is now a corporation duly incorporated and organized under the general laws of the State of Missouri concerning manufacturing and business corporations, having full power to do all the acts herein mentioned as having been by it done, and having its chief office in the City of St. Louis, Missouri, and being now and having been since the date last above mentioned, a citizen of the State of Missouri and a resident of the Eastern Division of the Eastern Judicial District of Missouri; and that said defendants are officers and employes of the Government of the United States, under and subject to the laws thereof, namely:

Dr. James J. Brougham, a citizen of the State of Missouri and a resident of the City of St. Louis therein, in said Eastern Division of said District, and who is and for several

5 years last past has been Chief Inspector (at said City) of the Bureau of Animal Industry of the Department of Agriculture of the United States, duly qualified and acting as such an inspector in charge and direction of said Bureau in said City:

Arthur N. Stankey, who is a citizen of the State of Missouri, resident in said City of St. Louis, and is a local in-

spector of said Bureau of Animal Industry and as such now is, and for a long time last past has been, in charge of the inspection for said Bureau of Animal Industry at the manufacturing plant of plaintiff in said City of St. Louis, having been stationed there, as plaintiff is informed and believes, by his superior officers of said Bureau, and subject to the orders of said Dr. Brougham, as inspector in charge thereof at St. Louis;

Alonzo D. Melvin, whose citizenship is at present unknown to plaintiff, but whom plaintiff knows as the Chief of the said Bureau of Animal Industry, and a resident at the City of Washington, in District of Columbia; and

Honorable David F. Houston, who, as plaintiff is informed and believes, is a citizen of Missouri and a resident of the said City of St. Louis, and who is at the present time (and since March 4, 1913, has been) Secretary of Agriculture of the United States, the official head of said Bureau of Animal Industry, which Bureau is a part of the Department of Agriculture of the Government of the United States, and is subject to the laws thereof;

Second. The grounds upon which the jurisdiction of this Court depends are that the matter in controversy exceeds in amount (exclusive of interest and costs) the sum or value of five thousand dollars, and that this suit in Equity, moreover, arises under the internal revenue laws, the trade-mark laws and other laws of the United States, and involves the construction and application of the Constitution and laws of the United States, the effect of which plaintiff, your orator, prays may be applied for the protection of the rights of plain-
6 tiff in and to the trade-mark, trade-name, labels, stencils and business of plaintiff in the circumstances described in this bill;

Third. For many years last past the plaintiff, your orator, has been and is now the manufacturer of Oleomargarine, which plaintiff for many years last past has sold and offered for sale in packages of various sizes, labeled or marked with the trade-mark and trade label or stencil of the plaintiff, designed and adopted by the plaintiff for that purpose, which trade-mark is the word "Creamo", as applied and affixed to or upon packages of Oleomargarine of plaintiff's manufacture, which trade name has been in exclusive use by plaintiff for said purpose since the time of the said incorporation of plaintiff in 1904, and which said trade name and mark, "Creamo" Oleomargarine, had been previously approved for such use by the Internal Revenue Department of the United States by the Acting Commissioner of Internal Revenue of the Treasury Department of the United States Government,

and which approval for such use was later confirmed in December, 1906, during the incumbency of Hon. Leslie M. Shaw as Secretary of the Treasury of the United States, during the Administration of Theodore Roosevelt as President of the United States; and the business and trade of plaintiff, your orator, in the manufacture and sale of Oleomargarine under the trade-mark aforesaid, is now and for many years last past has been extensive and valuable, and the rights of plaintiff, your orator, of, in and to the use of said trade name and mark, and in and to the use thereof, affixed or attached by labels, stencils and otherwise to and on packages of Oleomargarine, sold by the plaintiff, your orator, have become of great value, the loss or destruction of or injury to which would cause a serious and irreparable pecuniary injury to plaintiff, your orator; and by reason of the long experience and industry of the plaintiff in said business of the manufacture of said Oleomargarine, distinguished from other brands or kinds of Oleomargarine by plaintiff's said trade-mark "Creamo" Oleomargarine on labels approved by the Bureau of Animal Industry in 1907, said Oleomargarine made by plaintiff and so sold has become widely known
7 in Missouri and throughout the United States as a valuable and useful article of commerce, and has acquired a high reputation, and has commanded and continues to command an extensive sale, which is and has been a source of profit to the plaintiff, and of increasing value yearly; that plaintiff's said article is known to the public and to dealers, buyers and consumers thereof by said name of "Creamo" Oleomargarine on said labels, and by the plaintiff's said device and trade-mark and name upon the article as sold by plaintiff and by dealers therein and to consumers who have become thereby well acquainted with plaintiff's said product of manufacture under said name, mark and label, which now possess, and for a long time past have possessed a good will of much value to plaintiff, the impairment, interruption or injury whereof would cause serious pecuniary injury to plaintiff in a sum exceeding five thousand dollars, the exact amount whereof plaintiff is unable at this time more definitely to state.

The form in which plaintiff's said trade-mark of "Creamo" Oleomargarine was so approved by said Bureau of Animal Industry in 1907, and has since been in use by plaintiff upon packages of Oleomargarine manufactured and sold by plaintiff, is as follows:

8 Plaintiff is using and has used the above trade-mark in the form of said "Creamo" Oleomargarine, of plaintiff's make and manufacture, upon small packages, of one pound each; and in marking for sale its two, three and five pound packages of said product, plaintiff has used a similar label, containing the same trade-mark of "Creamo" Oleomargarine with plaintiff's name as well as the name of the place of manufacture (St. Louis, U. S. A.) and a memorandum of the fact of United States Inspection thereon, the form of which labels has also been separately approved by said Bureau of Animal Industry, as shown by a letter of the said defendant Dr. Brougham, Inspector in charge at St. Louis, July 8, 1912, (a copy whereof is herewith filed marked "Exhibit B" and made part of this bill).

Furthermore, the plaintiff, your orator, on the 6th day of January, 1908, duly applied for registration of its said trade-mark "Creamo" in the Patent Office of the United States and accordingly on the 9th day of June, 1908, said trade-mark "Creamo" for Oleomargarine was duly registered as such (numbered 69,352) in said Patent Office, and a certificate thereof duly issued to plaintiff on said last named date by the Acting Commissioner of Patents of the United States; and plaintiff thereafter has enjoyed the use and exclusive trade privilege of employing and using said name or mark on Oleomargarine, manufactured by plaintiff, and at the present time plaintiff, your orator, has outstanding many contracts with dealers engaged in the sale thereof under said trade name and mark upon the label above exhibited and has expended large sums of money for the purpose of making dies and plates for

the printing of like labels for packages of Oleomargarine to be sold under said trade-mark "Creamo" as above shown so that any interruption or cessation of the sales, now continuously going on, of such Oleomargarine manufactured by the plaintiff, your orator, under said trade-mark "Creamo" Oleomargarine designated by said trade label, would be extremely injurious and financially damaging to plaintiff, your orator, and reasonable compensation for any such injury would be impracticable to ascertain in view of the na-
9 ture of the property right of the plaintiff, your orator, in said trade-mark and label therewith as an instrumentality of commerce in the sale of the Oleomargarine of plaintiff's manufacture.

Not only in the manufacture of said Oleomargarine, which is an article of food, but likewise in the dressing and marking of plaintiff's said Oleomargarine for sale, plaintiff now exercises and for many years last past has exercised great care, so that any and all packages containing said "Creamo" Oleomargarine which are offered for sale by plaintiff, bear a label or brand thereon, having said trade-mark "Creamo" Oleomargarine exhibited in the form already shown herein by the label aforesaid, with a statement of the place (St. Louis) where said article is manufactured or produced; and truly stating the distinctive name of the contents as Oleomargarine, which is an article of food widely used, and known to the public and to many traders therein throughout the United States, and to consumers thereof; and plaintiff takes special care and exercises great diligence to keep the quality of said "Creamo" Oleomargarine (when offered for sale and when sold by plaintiff) good, wholesome, sanitary and healthful without any poisonous or deleterious ingredients of any sort therein, and without any false or misleading label or description whatsoever thereon, and said "Creamo" Oleomargarine is not otherwise offered for sale or sold by plaintiff, at any place, to any trade dealer, customer or buyer whatsoever.

Plaintiff has gone to great pains, trouble, care and expense, through many years until the present time, to produce a meritorious article of food and of commerce, in said Oleomargarine, and to deserve the custom, patronage, trade and good will which plaintiff now enjoys in the sale of its said "Creamo" Oleomargarine under the label set out above, and now known to plaintiff's customers far and wide by said label and trade name and mark.

The manufacturing plant and establishment of plaintiff is now, and for many years last past has been, situated in said City of St. Louis, on Spruce and Second Streets there-
10 in, and comprises a group of buildings, specially ar-

ranged, fitted and equipped for the purpose of such manufacture, and where plaintiff has made an investment of many thousands of dollars for the establishment, maintenance, improvement and development of the manufacture of Oleomargarine, and where plaintiff has carried on and is now carrying on the manufacture of "Creamo" Oleomargarine, as already described, the good will thereof has become a large part of the value of the property of plaintiff, invested in said plant and establishment.

Plaintiff further states that as a manufacturer of Oleomargarine as aforesaid, it has been and is now duly licensed and bonded to the United States Government as such, and has paid the special tax required under the Act of Congress of August 2, 1886, (as amended by the Act of Congress of May 9, 1902) concerning Oleomargarine, and plaintiff is now complying and has heretofore duly complied with the requirements thereof touching the filing of notices, inventories and bonds with the Collector of Internal Revenue of the district in which plaintiff's said manufactory is located and has duly complied with the laws and with the regulations of the Commissioner of Internal Revenue in regard to the conduct of plaintiff's said business as such manufacturer of Oleomargarine; and plaintiff has packed and is continuously packing the "Creamo" Oleomargarine aforesaid, in such packages as are prescribed by the regulations of the [of the] Commissioner of Internal Revenue; and said packages of Oleomargarine of plaintiff are duly marked, stamped and branded for sale, as prescribed by the regulations of said Commissioner under section six of said Act of Congress of August 2, 1886, and the ingredients thereof are subject to examination by the said Commissioner under said Internal Revenue laws concerning Oleomargarine, and the said Commissioner, prior to as well as in the year 1906, during the incumbency of Hon. Leslie M. Shaw as Secretary of the Treasury of the United States, approved and sanctioned the use by plaintiff of the trade name and label of "Creamo" Oleomargarine
11 (above exhibited herein) as applied to the Oleomargarine manufactured by plaintiff, and as so marked by label or brand on packages thereof for sale by plaintiff, which approval, as plaintiff is informed, advised and verily believes, is yet in full force and effect.

Plaintiff further states that in the year 1906, after the enactment of the Act of Congress, approved June 30, 1906 (34 Statutes at Large 674) concerning the inspection of "meat and meat food products", said defendant Dr. Brougham, as inspector in charge of the Bureau of Animal Industry of the Department of Agriculture of the United States, at the said City of St. Louis as aforesaid, notified plaintiff that the plant

and manufactory of plaintiff was subject to inspection under said last named Act of Congress, and that without such inspection, none of the Oleomargarine produced by plaintiff's said factory would be suffered or allowed by the United States to be shipped into other States from St. Louis, Missouri, as part of interstate commerce, under the heavy penalties denounced by said last cited Act of Congress. To said claim, the plaintiff, by its President at the time, duly protested verbally and objected to said Dr. Brougham, as inspector in charge, as aforesaid; yet, nevertheless, in order to avoid controversy, plaintiff deemed it expedient to have such proposed inspection of its manufactory rather than to hazard its large and valuable interstate commerce in Oleomargarine; so an inspector of said Bureau was accordingly installed at plaintiff's said manufactory, which inspector acts under orders of said Bureau of Animal Industry, pursuant to said last cited Act of Congress of June 30, 1906; and plaintiff has conformed to the lawful regulations of said Bureau, although plaintiff is advised and believes and hence charges that the inspection of plaintiff's manufactory of Oleomargarine is not within the lawful jurisdiction, power or authority of said Bureau, and that plaintiff is entitled of right to carry on its local and its interstate commerce in the products of its said factory without the said inspection by the inspector of said Bureau, who, at this time, is defendant Stankey, stationed thereat.

12 Plaintiff further states that, during the administration of Hon. James Wilson, Secretary of Agriculture of the United States, in the year 1907, the said trade-mark of plaintiff, "Creamo", and the label (as above recited) exhibiting same, as applied to Oleomargarine manufactured by plaintiff at its said factory and as affixed by said label to packages thereof for sale, was duly submitted to the Bureau of Animal Industry of said Department of Agriculture and after certain suggestions by the Chief of the Inspection Division thereof had been made and accepted by plaintiff, the said trade-mark and label of plaintiff: "Creamo Oleomargarine", printed and displayed in the label for packages thereof (as shown herein by the sample exhibited) as so approved by said Department, in the year 1907, was continued in use by plaintiff for purposes of commerce and in reliance and on the faith of said sanction and approval plaintiff proceeded to utilize said trade label and mark, and to expend large amounts of money to extend the popularity and publicity thereof, and has since greatly increased the sales and good will of said "Creamo" Oleomargarine, under said mark and approved label of plaintiff.

That notwithstanding the facts aforesaid, said Dr. Broug-

ham, defendant, who at the City of St. Louis, Missouri, is the inspector in charge of the said Bureau of Animal Industry of the Department of Agriculture of the United States, has (as representative of said Bureau as aforesaid) threatened and notified plaintiff, your orator, that from and after the first day of March, 1914, the use by plaintiff of its said trade name, mark and label of "Creamo", as above set out, and as applied to and upon Oleomargarine manufactured or sold by plaintiff, "will not be allowed"; as shown by letter of said defendant to the solicitor of plaintiff, a copy whereof is herewith filed marked "Exhibit A" and made a part of this bill; and plaintiff, your orator, upon information and belief avers that said defendant, Stankey, the local inspector at plaintiff's said manufactory and plant in St. Louis, will enforce said threat and notice, and plaintiff is informed and believes that all of defendants will, on and after
13 March 1, 1914, as a part of the operations of said Bureau of Animal Industry, attempt to prevent and interfere with the use and enjoyment by plaintiff of its said trade-mark and label "Creamo" (as hereinbefore depicted) in the manufacture and sale of Oleomargarine, and will attempt to prevent thereby to deprive plaintiff of its valuable rights and property therein and (as plaintiff is advised and believes) without lawful authority or jurisdiction so to do, and without due process of law, in violation of the laws of the United States and of the rights, privileges and immunities of plaintiff secured to it by the Constitution of the United States, and especially by the fifth Amendment thereof; that plaintiff is advised that said threatened acts of defendants are unlawful and are contrary to equity and good conscience; and plaintiff avers that if said threats are carried out and executed, the damages to plaintiff and its business will exceed the sum or amount of ten thousand dollars, and that a great part of the value and good will of said trade-mark and label consists in the continuous use of same among the traders, dealers and customers, who have become accustomed to buy, use and consume said "Creamo" Oleomargarine as so sold by plaintiff under said name and label; and that any cessation of the continuous shipment, use and sale of the same as now and heretofore customary to plaintiff's trade, would, as plaintiff verily believes, injuriously affect the business of plaintiff to an amount in excess of five thousand dollars.

Plaintiff further states that said trade-mark of plaintiff (as shown upon the form of the label hereinbefore copied and reproduced in this bill) has been duly registered by plaintiff as a trade-mark in the office of the Secretary of State of

Missouri under the laws of that State, as well as in the Patent Office of the United States under the laws thereof.

Fourth. The parties defendant herein are all officers of the Department of Agriculture of the United States, and the cause of action herein averred has arisen in this Eastern Division of this District wherein said manufactory of plaintiff is situated and in active business operation.

14 Fifth. Plaintiff avers further that it is informed and verily believes that unless duly restrained by process, said defendants will execute the threat aforesaid and will attempt to interfere with and prevent the use by plaintiff of its said trade-mark and label on and after March 1, 1914, to the great injury and damage of plaintiff and of its business and property as aforesaid, and that in the circumstances described a recovery of damages therefor would be inadequate, and that plaintiff, in said premises above described, is remediless according to the strict rules of the common law, and can have or obtain no adequate relief except in this Court as a court of equity, and to the end, therefore, that the defendants may, if they can, show why the plaintiff may not have the relief hereby prayed and make a full discovery and disclosure of all the matters aforesaid, according to the best and utmost of their knowledge, remembrance, information and belief, and full, direct and perfect answer make to the matters hereinbefore charged (but not under oath the same being hereby expressly waived), plaintiff further prays that this Court may grant to plaintiff a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining said defendants from [interferring] with the use and enjoyment by plaintiff (in interstate commerce or otherwise) of its said trade-mark "Creamo" Oleomargarine upon its labels now in use in its said business as above described, and from attempting to deprive plaintiff of the use thereof, and to order and grant to plaintiff a provisional or temporary injunction forthwith restraining said defendants and each of them from so interfering with said use and enjoyment of said trade mark upon its labels aforesaid; and may grant to plaintiff such other and further relief, whether general or special, as the equity of the case may require and to the Court may seem fit.

May it please the Court also to grant unto plaintiff not only a writ of injunction conformable to the prayer of this bill, and the other and general relief prayed, but also a writ of summons in due course, directed to the said defend-

15 ants, commanding them to appear and answer unto this petition and to abide and perform such order and decree in the premises as to the Court shall seem proper and

as may be justly required by the principles of equity and good conscience, and that the plaintiff may have such other and further relief as may be just and in conformity to the principles and practice of Courts of Equity of the United States; and plaintiff will ever humbly pray, etc.

BARCLAY, ORTHWEIN & WALLACE,
SHEPARD BARCLAY,
Solicitors and of Counsel for said Plaintiff.

SHEPARD BARCLAY,
Of Counsel for Plaintiff.

State of Missouri,
City of St. Louis—ss.

David A. Blanton of lawful age, having been first duly sworn, says on his oath that he is, and has been for many months last past, President of the Blanton Manufacturing Company, the plaintiff in the above entitled cause, and that he is duly authorized by said Company to make this affidavit on its behalf, and that the matters and facts stated in the foregoing petition are true, except as to those matters therein stated on information or belief or as matters of opinion, and those matters the affiant verily believes to be true.

DAVID A. BLANTON.

Subscribed and sworn to before me, the undersigned, by the above named affiant who is personally known to me to be the same person whose name is above subscribed, this 24th day of February, 1914.

W. W. NALL,
(Seal) Clerk United States District Court.

16 "Exhibit A"

United States Department of Agriculture
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.,
St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:—

Referring to your letter of February 9th, relative to a copy of a letter to The Blanton Co. on the subject of a trade label "Creamo." You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this sub-

ject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:

(Signed) JAS. J. BROUGHAM,
Inspector in Charge.

"Exhibit B"

United States Department of Agriculture,
Bureau of Animal Industry.
Local Office,
924 Chemical Bldg.,
St. Louis, Mo;
July 8th, 1912.

The Blanton Co.,
115 Spruce St.,
St. Louis, Mo.,

Gentlemen:

Enclosed find "Creamo Oleomargarine" Trade Label which has been approved by the [Wasington] office.

Very respectfully,

(Signed) JAS. J. BROUGHAM.
Inspector in Charge.

P. S. When the original Trade Label is finished, please send three copies to this office.

J. J. B.

17 (Subpoena in Chancery).

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—Set.

In the District Court of the United States in and for Said Division of Said District.

The President of the United States of America, To James J. Brougham, Arthur N. Stankey, Alonzo D. Melvin and David F. Houston—Greeting:

You are hereby commanded to be and appear at and before the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, on Monday, March 16th, 1914, at the City of St Louis, then and there to answer the bill of complaint of Blanton Manufacturing Company, citizen of the State of Missouri, filed against you on the twenty-fourth day of February, 1914; hereof fail not.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, the 24th day of February, 1914.

Issued at Office in the City of St. Louis, under the Seal of said District Court, the day and year last aforesaid.

(Seal). W. W. NALL, Clerk.

Memorandum: The Defendant is required to file answer or other defense in the Clerk's office on or before the twentieth day after service, excluding the day thereof;
18 otherwise, the bill may be taken pro confesso.

W. W. NALL, Clerk.

(Marshal's Return).

United States of America, Eastern Division of the Eastern Judicial District of Missouri—ss.

I do hereby certify that at the City of St. Louis, Mo., in the Eastern District of Missouri, on the 25th day of February, A. D., 1914, I executed this writ by delivering a true and correct copy of this writ to the within named James J. Brougham and Arthur N. Stankey, personally.

Alonzo D. Melvin and David F. Houston could not be found within the Eastern District of Missouri.

EDW. F. REGENHARDT,
U. S. Marshal, Eastern District of Missouri.
By W. G. DAVIS, Deputy.

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19 (Order, February 25, 1914, Application for Issuance of Temporary Injunction set down for Hearing.)

Now at this day comes said complainant by its solicitor, and comes also the United States Attorney appearing for the defendant Brougham; whereupon, by consent of parties, it is Ordered that the application of said complainant for the issuance of a temporary injunction in this cause be and the same is set for hearing on February 28th, 1914 at eleven o'clock A M., at which day and hour the said defendants may show cause, if any they have, why such injunction should not be granted and issued in conformity to the prayer of complainant's bill of complaint. Notice of application filed.

February 25th, 1914.

(Signed) DAVID P. DYER,
Judge.

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20 (Order to show Cause, February 28, 1914.)

St. Louis, Feb'y. 28th, 1914.

Now comes said complainant by its solicitors, and the defendants Brougham and Stankey appear by Hon. Chas. A. Houts, United States Attorney, and by Hon. W. P. Jones, Solicitor for the Department of Agriculture; and the complainant having duly submitted to the Court its sworn bill of complaint and exhibits thereto, and the Court having

heard argument of counsel and being now fully advised of the application for a temporary restraining order, it is now Ordered by the Court that said defendants show cause and make return, herein, on or before March 16th, 1914, why a temporary injunction should not be granted as prayed in said complainant's bill, and that in the meanwhile said defendants desist from interfering or from attempting to interfere with the use by said complainant of its label and of its said alleged trade name, as described in said bill of complaint, until the further order of this Court.

(Signed) DAVID P. DYER, Judge.

Approved as to form,

CHARLES A. HOUTS,
United States Attorney.

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21 (Order of Submission, March 17, 1914.)

Now at this day comes the said complainant by its solicitor and also the defendants, Brougham and Stankey, appearing by the United States Attorney for the Eastern District of Missouri, and file their joint answer to the Bill of Complaint in this cause.

And this cause now coming on to be tried before the Court upon the said bill of complaint and the said answer thereto, the introduction of evidence is commenced and concluded, and the cause is submitted to the Court with leave to said complainant to present a brief in Ten (10) days and with leave to said defendants to reply thereto within Ten (10) days thereafter.

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22 Separate Answers of Defendants James J. Brougham and Arthur N. Stankey.

Now come defendants James J. Brougham and Arthur N. Stankey, and for their answer to the bill of complaint filed herein admit the incorporation and residence of the plaintiff as set out in said bill of complaint; and admit the residence, citizenship and official position of each of the defendants mentioned in said bill of complaint as described therein.

Defendants further admit that plaintiff has been for many years, and is now, a manufacturer of oleomargarine; that plaintiff has sold oleomargarine and offered it for sale in packages of various sizes and labeled or marked with the trade label or stencil "Cremo", but as to whether or not said trade label or stencil has been in exclusive use by the plaintiff since 1904, and as to whether or not said trade name and mark had been previously approved for such use by the Internal Revenue Department of the United States, or by the Acting Commissioner of Internal Revenue of the Treasury Department, and as to whether or not said use of said

23 trade name or mark was confirmed in December, 1906, during the incumbency of Honorable Leslie M. Shaw as secretary of the Treasury, these defendants have no knowledge.

And these defendants further say that they have no knowledge as to whether or not the business and trade of plaintiff in the manufacture and sale of oleomargarine under said trade mark is or has been extensive in value; nor have they any knowledge as to whether the use of said trade name and mark by plaintiff has become of great value; nor have they any knowledge as to whether or not the loss or destruction or injury to said use of said trade name or mark would cause a serious, irreparable and pecuniary injury to plaintiff; nor have defendants any knowledge as to whether or not the oleomargarine manufactured by plaintiff under said trade name and mark has become widely known in Missouri and throughout the United States as a valuable and useful article of commerce and has acquired a high reputation and has commanded and continues to command an extensive sale which is and has been a source of profit to the plaintiff and of increasing value yearly; nor have defendants any knowledge as to whether or not plaintiff, by the sale of its said oleomargarine and the use in connection therewith of said trade name and label, has acquired a good will in its business of any value; nor have defendants any knowledge that any impairment or injury to said good will would cause pecuniary injury to plaintiff in any sum whatever.

And defendants further [says] that they have no knowledge as to whether or not plaintiff applied for and secured registration of its said trade-mark "Creamo" in the patent office of the United States, but defendants say that if registration thereof was obtained, as alleged in said bill of complaint, such registration conferred no authority for plaintiff's use of said trade name and trade mark in connection with the sale and shipment of plaintiff's oleomargarine under
24 the facts and circumstances as hereinafter in this answer disclosed.

And defendants also further say that they have no knowledge as to whether or not plaintiff has complied with the laws and regulations of the Commissioner of Internal Revenue with regard to the conduct of plaintiff's business as to the manufacture and sale of oleomargarine; nor have defendants any knowledge as to whether or not the packages of oleomargarine produced and sold by plaintiff are marked, stamped and branded for sale as prescribed by the regulations of the Commissioner of Internal Revenue; nor have defendants any knowledge as to whether or not the Commissioner of Internal Revenue in the year 1906 approved and sanctioned the use by

plaintiff of the trade name and label described in plaintiff's bill of complaint in connection with the manufacture and sale of oleomargarine, but defendants say that if plaintiff has duly complied with the rules and regulations prescribed by the Commissioner of Internal Revenue, and if the use of said trade name and label was approved by the Commissioner of Internal Revenue, said facts confer no authority upon plaintiff to use said trade name and label under the facts and circumstances hereinafter in this answer set out.

Defendants, further answering, deny that during the administration of Honorable James Wilson, Secretary of Agriculture of the United States, the said label set out and described in the bill of complaint was submitted to and approved by the Bureau of Animal Industry; and deny that said label as set out and described in plaintiff's bill of complaint was ever approved by the Secretary of Agriculture, or by anyone acting for him.

Defendants, further answering, say that the oleomargarine manufactured, produced and sold by plaintiff is a food and meat, or meat food, product which has been and is being sold and offered for sale by plaintiff in interstate and foreign commerce, and that it is subject to the provisions of both the
25 Meat Inspection Act and the Food and Drugs Act; that said oleomargarine so produced and sold by plaintiff is, prior to its being offered for sale, packed in cartons and other receptacles or coverings of the kind and character described by the fifth paragraph of said Meat Inspection Act; that said fifth paragraph of said act provides as follows:

"No such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under false or deceptive name; but established trade name or names which are usual to such products; and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

That on or about the _____ day of _____, 19__, the Secretary of Agriculture, pursuant to the authority vested in him by law, duly promulgated certain regulations governing the use of trade names and trade labels in connection with the manufacture and sale of meat or meat food products in interstate commerce, and among others Regulation 18, which said Regulation 18 contains the following provisions:

"Section 2—Duplicate copies of each trade label in the form of sketches or proofs shall first be submitted to the Department, and no trade label shall be used until a sketch or proof thereof has been approved. After trade labels are printed from approved proofs or sketches they shall be for-

warded in triplicate to the Department for approval and filing."

"Section 10—No meat or meat food products shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted."

"Section 11—No picture, design or device which gives any false indication of origin or quality shall be used upon any label. The law prohibits any statement, design or device false in any particular regarding the virtues or properties of the materials contained in the package."

That pursuant to said Meat Inspection Act and said Regulations, and upon request from the Secretary of Agriculture, acting through his duly authorized subordinates, plain-
26 tiff submitted for the approval of the Secretary of Agriculture the trade label "Creamo Oleomargarine" set out and described in the bill of complaint herein; that thereupon and thereafter the Secretary of Agriculture, through his duly authorized subordinates, notified plaintiff on several occasions that said label and trade name was disapproved by the Secretary of Agriculture, although plaintiff was permitted the temporary use of said trade name and label during part of the year of 1912, until it had used up the supply of labels and cartons which it represented to the Bureau of Animal Industry that it had on hand during said year. After the said supply of labels and cartons had been exhausted by plaintiff in the year 1912, plaintiff was again notified that the Secretary of Agriculture had disapproved of the said label and trade name as set out and described in the bill of complaint.

And defendants say that during the past two years the approval of said labels and the use thereof by plaintiff have been the subject of discussion, both verbal and written, between plaintiff and the officials of the Bureau of Animal Industry, the latter acting on behalf of the Secretary of Agriculture; that the Secretary of Agriculture has at all the said times been willing, and has so informed plaintiff of his willingness, to approve said label and thereby permit its use in connection with the sale of plaintiff's product, providing plaintiff would place upon said label suitable words indicating that the words "Creamo Oleomargarine" constitute merely a trade name or brand, and the Secretary of Agriculture offered to approve said label modified so as to read "Creamo Brand Oleomargarine," providing said label should be used only upon oleomargarine containing not less than 10 per cent of cream.

27 And defendants say that plaintiff has refused to modify its said label as requested by the Secretary of Agriculture, and that plaintiff has used said label upon its said oleomargarine as aforesaid, for the purpose of deceiving and causing the purchasers thereof to believe that the said oleomargarine produced by it is made from and contains a substantial quantity of cream; and plaintiff by the use of said labels, and by the use of advertising matter and letterheads sent to its customers, has succeeded in inducing the belief on the part of said customers that said oleomargarine is manufactured from and contains a substantial quantity of cream, whereas in truth and in fact large quantities of the oleomargarine manufactured and sold by plaintiff under said label and trade name has contained no cream, and such of its product as has contained cream has contained not over 10 per cent of cream, and all of its product, both that containing cream and that containing no cream, has been sold under the same label and trade mark described in the bill of complaint.

And defendants say that because of the facts aforesaid, the said label, as so used by plaintiff, is deceptive and misleading, and that the Secretary of Agriculture, in exercising the discretion and judgment vested in him by law, has determined that said label is deceptive and misleading, and in consequence thereof has disapproved of said label and its use in connection with the manufacture and sale of plaintiff's said product.

28 And these defendants, further answering, say that it is their duty to inspect the product manufactured by the plaintiff and to attach to such of said product as they find to have been manufactured and labeled in accordance with law and the regulations of the Secretary of Agriculture a stamp showing that said product has been inspected and passed; that under the law and the rules and regulations in connection therewith these defendants can only pass such meat products as are sold under a trade name or label approved by the Secretary of Agriculture.

And these defendants say that when they notified plaintiff that the use of said trade name and label would not be allowed after the 1st day of March, 1914, they intended plaintiff only to understand, and plaintiff did so understand, that on and after said date the defendants would refuse to attach to the oleomargarine manufactured by plaintiff the Government stamp showing that said product had been inspected and passed, if said product should be sold under and have thereon the label or trade name described in the Bill of complaint; and that these defendants have and had no intention of interfering with plaintiff's use of said label otherwise than by reporting to the officers charged with the enforcement of the

law the facts with respect to the use of said label and with respect to the sale of such of plaintiff's product as did not bear the Government's stamp showing that the product had been inspected and passed by them.

Wherefore, having made full answer to the bill of complaint filed herein, these defendants asked to be hence dismissed, with their costs.

CHARLES A. HOUTS,
United States Attorney for Defendants.

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29 (Memorandum Opinion of the District Court, filed April 27, 1914.)

Dyer, J.

The complainant now is, and for many years last past has been, engaged in the manufacture and sale of oleomargarine in the City of St. Louis, and State of Missouri. The business of the complainant has steadily grown until its proportions are now very great. This, in spite of the fact that the annual license tax amounts to six hundred dollars, and in addition thereto a tax of ¼ of one per cent on each and every pound of white or uncolored oleomargarine manufactured by it, and ten cents a pound on each and every pound of colored oleomargarine manufactured by it, is imposed by law. The license tax of $600.00 per annum has to be paid at the beginning of each year, and the tax imposed upon each and every pound of white and colored oleomargarine has to be paid by the manufacturer before it is removed from the factory. Failure to comply with these requirements is followed by heavy penalties imposed upon the manufacturer. No package is allowed to leave the place of manufacture without being plainly marked "Oleomargarine". Failure to comply with the law in this regard imposes heavy penalties upon the manufacturer also. As far as the evidence shows in this cause the complainant has at all times complied with the law.

Prior to 1904 the complainant began the use of a brand or "trade mark" upon portions of its product, in the form following:

"The Blanton Co.
30 St. Louis.
Creamo
Oleomargarine.

This "trade mark" or brand (from the proof in the case) seems to have been approved by the Commissioner of Internal Revenue on the 19th of January, 1904.

After the meat inspection act was passed, June 30, 1906, the complainant submitted the same brand to the Bureau of Animal Industry, and it was officially approved by it, as

shown in a Department letter dated May 24, 1907, signed by Rice P. Steddon. To this letter is attached a sample of the label which in all respects is the same as the one appearing in the bill of complaint in this case.

The evidence shows that for more than five years the complainant used this label upon its products, not only without objection upon the part of the proper officers of the Government, but with their approval.

An attempt, it appears, is now made by those in authority to reverse the decisions of their predecessors and to require a change to be made in this particular brand or "trade mark".

The complainant has expended large sums of money in advertising and popularizing its product, covered by such brand. It would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

The complainant is entitled to the relief prayed for in its bill. An order to that effect will be entered.

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31 (Final Decree, May 13, 1914.)

Blanton Manufacturing Company, Plaintiff,

v.

James J. Brougham, et al., Defendants.

Equity. No. 4262.

Eastern Division of the Eastern Judicial District of Missouri, ss:

Now again come the parties heretofore appearing herein, the plaintiff, Blanton Manufacturing Company by its solicitors, and James J. Brougham, as Chief Inspector in Charge of the Bureau of Animal Industry of the Department of Agriculture of the United States of America, and Arthur N. Stankey, inspector for said Bureau, defendants, by their solicitor, the Honorable, the United States Attorney for the Eastern Judicial District of Missouri; and this cause, having been heretofore fully heard by the Court upon the pleadings and all the evidence, proofs and arguments of the respective parties to this cause, and the same having been duly submitted to and considered by the Court, and being now sufficiently advised, the Court doth find that this cause is one arising under the constitution and laws of the United States; that the defendants aforesaid, having been duly served with process of summons herein and having heretofore duly appeared herein, by their said solicitor and counsel, that this Court has due and full jurisdiction of said cause, as well as over the said defendants, and the Court doth further find the issues herein joined

in favor of plaintiff, and that, on the facts averred in the bill of complaint, either admitted by said defendants or established by the testimony and proofs adduced, plaintiff is
32 entitled to the relief prayed in its said bill; now, therefore, it is adjudged, considered and decreed by the Court that said James J. Brougham as Chief Inspector in Charge of the Bureau of Animal Industry of the Department of Agriculture of the United States, and Arthur N. Stankey, as inspector for said Bureau, defendants, and their agents, successors and employees, jointly and severally, be and they are hereby perpetually enjoined and restrained from interfering with the use and enjoyment by plaintiff, its successors and assigns (in interstate commerce or otherwise) of its said trade-mark "Creamo", upon stencils and labels, as heretofore approved and used on packages of various sizes for the sale of Oleomargarine, substantially as described in plaintiff's bill of complaint herein in the form following:

The Blanton Co.
St. Louis
Creamo
Oleomargarine.

and that said defendants, their agents, successors and employees be further perpetually enjoined and restrained from attempting to deprive plaintiff, its successors and assigns, of the use of said brand, trade mark and label described in said bill of complaint, used upon packages of Oleomargarine manufactured, packed, sold or offered for sale by said plaintiff, its agents, successors, assigns or customers, in the prosecution or course of the business now conducted by plaintiff as manufacturer and vendor of Oleomargarine; and that plaintiff further recover of said defendants its costs in this behalf expended, and have execution therefor, as also such other process, original, ancillary or supplemental as may be appropriate to execute, carry out and enforce this decree.

May 13th, 1914.

(Signed), DAVID P. DYER,
Judge of said District Court.

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33 (Order, September 19, 1914, allowing Time to present Bill of Exceptions, etc.)

Now at this day come the defendants, James J. Brougham and Arthur N. Stankey, appearing by the United States Attorney for the Eastern District of Missouri, and on their motion it is

Ordered that the said named defendants be and they are hereby allowed to November 20th, 1914, to present their bill of exceptions in this cause, and that for the purpose of settling

and filing the said bill of exceptions this cause stand specially continued to the September Term, 1914, of this Court.

(Signed) DAVID P. DYER,
Judge.

Sept. 19th, 1914.

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34 (Petition for Appeal, etc., filed October 19, 1914.)

The above named James J. Brougham and Arthur N. Stankey, believing themselves aggrieved and injured by the order, judgment and decree entered by the Court in the above entitled cause on the 13th day of May, 1914, do hereby appeal from said order, judgment and decree to the United States Circuit Court of Appeals for the Eighth Circuit and pray that this, their appeal, may be allowed, and that a transcript of all the record, testimony, proceedings and papers in said cause and upon which said order, judgment and decree were made may be duly authenticated and sent to the said Circuit Court of Appeals for review and its consideration.

JAMES J. BROUGHAM,
ARTHUR N. STANKEY,
Defendants.
By ARTHUR L. OLIVER,
HOMER HALL,
their Attorneys.

An appeal is allowed as above prayed for this 19th day of October, 1914. (Signed). DAVID P. DYER,
District Judge.

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35 Order Allowing Appeal, October 19th, 1914.

Now come James J. Brougham and Arthur N. Stankey, two of the defendants in the above entitled cause, by their attorneys, and file and present to the Court their assignment of errors and their petition for an appeal from the order, judgment and decree entered in this cause on the 13th day of May, 1914, to the United States Circuit Court of Appeals for the Eighth Circuit; and it appearing to the Court that said defendants were officers of the United States and that all of the acts and things done by them and complained of in this action were done and about to be done in the discharge of their duties as such officers as they understood and intended; on due consideration of said petition for appeal and of said facts, it is

Ordered that said appeal be and it is hereby granted and allowed as prayed, and that no appeal bond be required of said defendants herein, nor any supersedeas granted.

Dated at St. Louis, Missouri, October 19th, 1914.

(Signed), DAVID P. DYER, Judge.

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36 Assignment of Errors of James J. Brougham and Arthur N. Stankey, Defendants.

Now come the above named defendants, James J. Brougham and Arthur N. Stankey, as appellants, and respectfully state and represent that they believe themselves aggrieved and injured by the order, judgment and decree entered by the United States District Court in the above entitled cause on the 13th day of May, 1914, and assign the following errors therein and thereto, to-wit:

First: The Court erred in its holding and finding that the said defendants and their agents, successors and employees jointly and severally ought to be perpetually enjoined and restrained from interfering with the use and enjoyment by the plaintiff and its successors and assigns of the alleged trade mark "Creamo" upon stencils and labels as heretofore approved and used on packages of various sizes for the sale of oleomargarine and substantially as described in plaintiff's bill of complaint and in the final decree of
37 the Court herein.

Second. The Court erred in holding, finding and decreeing that said defendants Brougham and Stankey, and their agents, successors and employes, be perpetually enjoined and restrained from attempting to deprive plaintiff and its successors and assigns of the use of said alleged brand, trade mark and label described in said bill of complaint herein used upon packages of oleomargarine manufactured, packed, sold or offered for sale by the plaintiff and its agents, successors, assigns or customers in the prosecution or course of business then conducted by plaintiff as manufacturer and vendor of oleomargarine.

Third. The Court erred in holding, finding and decreeing that the plaintiff was entitled to the relief prayed for in its bill of complaint and in entering a judgment and decree awarding to plaintiff such relief so prayed for.

Fourth. The Court erred in entering a decree for the plaintiff.

Fifth. The Court erred in holding and finding that the name or brand "Creamo" oleomargarine used by plaintiff was and is a trade-mark.

Sixth. The Court erred in holding and finding that the brand and label described and set forth in the bill of complaint was officially approved by the Bureau of Animal Industry and that for more than five years complainant [use] said label upon its products, without objection upon the part of the proper officers of the Government and with their approval.

Seventh. The Court erred in holding and finding that the plaintiff had a right to use a trade name, to wit, "Creamo Oleomargarine", without the approval of the Secretary of Agriculture.

Eighth. The Court erred in holding and finding that the plaintiff had a right to use the name "Creamo" upon its oleomargarine without the approval of the Secretary of Agriculture.

38 Ninth. The Court erred in holding and finding that the defendants Brougham and Stankey were not authorized and empowered to withhold from oleomargarine produced by plaintiff and labeled and branded "[Cremo] Oleomargarine" the stamp or mark "Inspected and Passed," when said name "[Cremo] Oleomargarine" did not have the approval of the Secretary of Agriculture.

Tenth. The Court erred in holding and finding that it would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

Eleventh. The Court erred in holding and finding that these defendants, Brougham and Stankey, were not authorized and empowered to enforce the rules and regulations adopted and approved by the Secretary of Agriculture and the officers of the Bureau of Animal Industry of the Department of Agriculture which related and pertained to the oleomargarine produced by plaintiff and referred to in its petition.

Twelfth. The Court erred in holding and finding that the complainant was entitled to the relief prayed for in its bill, and in entering a judgment in accordance therewith.

Thirteenth. The Court erred in not entering a judgment and decree in favor of the defendants.

Fourteenth. The Court erred in admitting and considering incompetent, immaterial and irrelevant evidence and in basing its finding and decree thereon.

Wherefore, said appellants Brougham and Stankey pray for a reversal of said Order, Judgment and Decree.

ARTHUR L. OLIVER
HOMER HALL,
Attorneys for Appellants.

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39 (Order, November 10, 1914, extending Time to Present Bill of Exceptions.)

On motion of the defendants, Brougham and Stankey, appearing by the United States District Attorney, the Court doth

Order that they be and are hereby granted to January 15th, 1915, to present their bill of exceptions in this cause.

(Order, November 30, 1914, extending Time to file Transcript.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor,

40 It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of January, 1915.

(Signed) DAVID P. DYER, Judge.

Dated, November 30, 1914.

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41 (Order January 13, 1915, Extending Time to File Transcript.)

September Term, 1914.

The above-named James J. Brougham, and Arthur N Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor, it is

Ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of March, 1915.

Dated January 13, 1915.

(Signed), DAVID P. DYER, Judge.

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42 (Order, January 13, 1915, extending Time to present Bill of Exceptions.)

September Term, 1914.

The above named James J. Brougham and Arthur N. Stankey, defendants and plaintiffs in error, by their attorney, Homer Hall, Assistant United States Attorney, applying therefor, it is

Ordered by the Court that the time for filing bill of exceptions in the above entitled cause, be and it is hereby enlarged and extended until and during the 15th day of March, 1915.

Dated January 13, 1915.

(Signed), DAVID P. DYER, Judge.

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43 (Praecipe for Transcript on Appeal, filed March 9, 1915.)

To the Clerk of the District Court:—

You will please prepare and transmit to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, a typewritten transcript in the above entitled cause, containing the entire record in said cause.

JAMES J. BROUGHAM
ARTHUR N. STANKEY
By VANCE J. HIGGS,
Assistant United States Attorney.

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44 (Election as to Printing of Transcript, filed March 9, 1915.)

The above named James J. Brougham, and Arthur N. Stankey, defendants, and plaintiffs in error in the above entitled cause, hereby elect to take a typewritten transcript of the entire record in said cause, the same to be printed under the supervision of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

JAMES J. BROUGHAM
ARTHUR N. STANKEY
Plaintiffs in Error.
By VANCE J. HIGGS,
Assistant United States Attorney.

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45 (Order, March 10, 1915, extending Time to file Transcript.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of April, 1915.

(Signed) DAVID P. DYER, Judge.

Dated March 10, 1915.

(Order, March 10, 1915, extending Time to present Bill of Exceptions.)

September Term, 1914.

The above-named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney,

Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing bill of exceptions in the above entitled cause be, and it is hereby, enlarged and extended until and during the 15th day of April, 1915.

(Signed) DAVID P. DYER, Judge.

Dated March 10th, 1915.

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46 (Order, April 15, 1915, extending Time to file Transcript.)

March Term, 1915.

The above named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor,

It is ordered by the Court that the time for filing the transcript of the record in the above entitled cause in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby enlarged and extended until and during the 15th day of June, 1915.

(Signed) DAVID P. DYER, Judge.

Dated, April 15th, 1915.

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47 (Order, April 15, 1915, extending Time to present Bill of Exceptions.)

March Term, 1915.

The above named James J. Brougham and Arthur N. Stankey defendants and plaintiffs in error, by their attorney, Vance J. Higgs, Assistant United States Attorney, applying therefor.

It is ordered by the Court that the time for filing bill of exceptions in the above entitled cause, be and it is hereby enlarged and extended until and during the 15th day of June, 1915.

(Signed) DAVID P. DYER, Judge.

Dated April 15, 1915.

(Order, June 9, 1915, extending Time to present Bill of Exceptions.)

By consent of parties, the Court doth

Order that the defendants, Brougham and Stankey, be allowed to July 1st, 1915, to present their bill of exceptions in this cause.

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48 (Bill of Exceptions, filed June 22, 1915.)

Be it remembered, that upon the trial of the above entitled cause, at the March Term of the District Court of the

United States for the Eastern Division of the Eastern District of Missouri, on the 17th day of March, 1914, before the Honorable David P. Dyer, Judge, the following proceedings were had:

Appearances:

Barclay, Orthwein & Wallace
by Mr. Barclay for Plaintiff.

Charles A. Houts, United States Attorney,
for Defendants James J. Brougham and Arthur N. Stankey.

49 Mr. Houts: I haven't filed the answer. I desire to file the answer now. I served Judge Barclay with a copy the other day.

Mr. Barclay: No objection, Your Honor.

Mr. Barclay: We asked our learned friends on the other side to produce certain papers, documents, which might be needed at the trial, and my learned friend, Colonel Houts, says that they are here, those that we have mentioned.

Now in regard to the pleadings, Your Honor, do you desire us to read the bill?

The Court: Well, I think I know about what it is.

Mr. Barclay: I think you might save time by having the answer read, unless you have given the Judge a copy of it?

Mr. Houts: No, I haven't given the Judge a copy. The answer, if Your Honor please, is as follows:

(Mr. Houts read the answer).

Mr. Barclay: If Your Honor please, under the present new rules in equity we regard all of the affirmative matter of the answer as denied without the filing of any reply.

(Testimony for Plaintiff.)

Thereupon the plaintiff, to sustain the issues upon its part, offered and introduced evidence as follows, to-wit: The bill and exhibits thereto were read, as follows: (Hereinbefore inserted)

Mr. Barclay: I wish to offer in evidence a letter by the Commissioner of Internal Revenue of January 19th, 1904, with the heading of the Treasury Department, Office of Commissioner of Internal Revenue, to the Collector of this District.

Mr. Houts: I want to object to it on the ground that it was prior to the meat inspection act and constitutes no authority for the use of this authority.

50 The Court: I will let it go in subject to your objection. I will consider the whole case when I get the whole case in. Any objection you may make may be taken and I will rule upon it afterwards.

Mr. Barclay: It is upon the letterhead of the Treasury De-

partment, Office of Commissioner of Internal Revenue, dated Washington January 19, 1904, there are some remarks of approval. I do not need to read the remarks except to say there are some official remarks of approval. By the way it is produced by counsel for the defendant in pursuance to a notice served upon them.

Said letter offered and admitted in evidence is in words and figures as follows, towit:

51 I. R. H. Jr.

Treasury Department

Copy J. C. W.

Washington,

January 19, 1904.

Office of Commissioner of
Internal Revenue
In replying refer to.

Ben Westhus, Esq.,
Collector 1st District,
St. Louis, Mo.

Sir:

This office is in receipt of a letter from Meinecke-Blanton Manufacturing Company, manufacturers of oleomargarine, Factory No 1, 3921 Lee Ave., St. Louis, under date of the 14th inst., inclosing copy of their stencil which they use in marking their packages of oleomargarine, and stating that their attention has been called to the fact that this stencil is not [is] compliance with the Treasury Regulations governing the same.

They further state that they have been using this stencil since the commencement of their business and that it is well known to their trade and possesses some pecuniary value, aside from the cost it would incur to change the same, and contend that the fact that the letters in "Creamo" are some little larger than those in oleomargarine, does not, in any way, injure any one.

This Company submit this stencil for the consideration of this Office, and request that they be allowed to continue its use.

In reply you are advised that, as provided in the Regulations, the word oleomargarine as used in said brand, is branded or stencilled in plain Roman letters not less in size than the letters used in the manufacturers' name; that the figures describing the size of the contents of the package are not greater than one-half the size of the letters prescribed for the word "oleomargarine"; that the word "Creamo" does not appear in any wise to obscure or encroach upon the Government brands or marks, or upon the word "oleomargarine", although the letters composing the word are a little

larger than the letters used in the manufacturers' name,
52 and therefore, this Office can see no objection to its use.

Respectfully,
J. W. YERKES,
Commissioner.

Mr. Barclay: These three (letters) are to be read in conjunction. The first is a copy of a letter to Dr. Brougham, the local inspector in charge of the Bureau of Animal Industry, by Mr. Rice P. Steddom, Chief Inspection Division of the Bureau of Animal Industry. It is as follows:

United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
Washington D. C. April 4th, 1907.

Dr. J. J. Brougham,
St. Louis, Mo.

Sir:—

Referring to your letter of the 1st instant, enclosed find trade label for "Creamo-Oleomargarine" submitted for the Blanton Co. In connection therewith you are advised that the statement marked X is considered deceptive unless all the oils and fats entering the product are meat food products as provided for by the meat inspection regulations. The ingredients should also be stated on the label.

Very respectfully,
(Signed) RICE P. STEDDOM
Chief Inspection Division."

53 Mr. Barclay: That has a letterhead of the United States Department of Agriculture, Bureau of Animal Industry, Local Office. This, however, is a copy of the original. That "local office" I take it, was not on the original.

Mr. Barclay thereupon read the following letter:

"United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
St. Louis, Mo., May 24th, 1907.

The Blanton Company,
City.

Sirs:

I enclose label with copy of a letter from Chief of Inspection Division. Please note the part of the label designated as "X" must be omitted.

Very respectfully,
(Signed) JAS. J. BROUGHAM,
Vet. [Instector.]"

Mr. Barclay: Now with that is pinned this label, which I would like to have Your Honor notice a moment before I read

what follows. (Handing same to the Court). That part that is marked in the margin with an "X" is taken out in the lower panel as a part of the descriptive matter. (Indicating on paper).

The letter of which the copy was enclosed in Dr. Brougham's letter that I have just read to you is as follows:

"United States Department of Agriculture,
Bureal of Animal Industry,
Local Office.
Washington, D. C., May 22nd, 1907.

Dr. Jas. J. Brougham,
St. Louis, Mo.

Sir:

Referring to your letter of the 17th instant, enclosed find copy of trade label for oleomargarine, submitted for The Blanton Co. for approval. In connection therewith you are informed that the statement appearing thereupon with reference to inspection, and marked with an "X" is not permissible, it being covered by regulation 35 B A I 137, i. e.

"Except as provided in these regulations, no reference to United States inspection shall appear upon any meat or meat food product or the container thereof."

54

otherwise the label is approved.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division"

Mr. Barclay: I now offer, Your Honor, in connection with that the paper which is pinned to that, which reads as follows:

The Court: You are reading that into the record?

Mr. Barclay: I am reading this into the record now, and the copy of which contains the trade mark is the same literally as the one that is in the bill on file, and following that in the next panel follows this language which is marked in the margin with an "X", directed thereafter to be omitted. I will read that passage "X" first:

"The United States Department of Agriculture maintain inspection in the factory of the Blanton Company. This product is passed on by a U. S. Inspector insuring absolute purity and cleanliness."

Now that is the passage that is marked with an "X".

The Court: That was stricken out?

Mr. Barclay: That was stricken out. What follows was not:

"Ingredients are Butter,—"I am reading this what follows now for another purpose and that is this (indicating label)—let me show it in a moment—later there is a formal one in

which the whole thing is approved, which omits this passage I have read and passed the inspection in a proper way.

(Resuming reading): "Ingredients are Butter, Oleo Oil, Neutral, Cream and Salt. These are churned in an abundance of richest cream, resulting in a perfect substitute for butter."

55 There is then a sentence which is partly erased, and which none of us that are concerned in the case are able to say whether the Government intended that to be erased or not. It does not appear to be in the passage marked "X", but still there is a line through it which looks as though it might be partly erased, and I will read it, notwithstanding I do not think it is material either way.

(Reading): "No coloring matter, color being derived from the cream."

That, however, I notice is kept in the formal one finally adopted.

Then follows this language:

(Reading): These goods are unexcelled for cooking and baking. Use only three-fourths as much as butter, and better results will be attained at much less cost. Try it where butter is now used, bearing in mind to use only three-fourths as much. Butter color sufficient to color the contents of this package, will be furnished free by your dealer, should you desire to color for table use." "This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness. After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors."

"Approved; B.A.I." which we understand to mean Bureau of Animal Industry.

With above reference to inspection left off.

56 Mr. Barclay: We now offer the one which contains the omission—that is, after the omissions have been made. This one is approved straight, just as it is.

Mr. Houts: It seems to me there ought to be some sanction for that shown. I don't know a thing in the world about that which Judge Barclay is saying now, Your Honor. I cannot say It was not or I cannot say it was.

The Court: Show that is the label that was approved.

Mr. Barclay: That is shown it is approved.

The Court: Let it be offered for what it is worth.

Mr. Barclay: We will show that later by Mr. Blanton.

The caption of first panel—this has four panels, the first is exactly the same as the one just shown and the one that is in the bill, our bill, in this case. This has, of course, omitted entirely any reference to the inspection on this paper:

(Reading): "All oils and fats entering into manufacture of Creamo Oleomargarine are double inspected by U. S. pure food inspectors stationed in our factory, insuring absolute purity and cleanliness."

The Court: That is what was eliminated?

Mr. Barclay: This is differently stated.

Mr. Houts: There ought to be some proof.

Mr. Barclay: Of the approval?

Mr. Houts: Yes, beyond that. There is not any proof here as to the genuineness of this paper nor any dates.

Mr. Barclay: Well, we will have Mr. Blanton explain that.

DAVID A. BLANTON,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr Barclay.

Q Please state your name? A David A. Blanton.

Q What relation have you to the plaintiff, the Blanton Manufacturing Company? A I am the president.

Q How long have you been president of that com-
57 pany? A Since its organization in 1904.

Q Are you a citizen of the State of Missouri? A I am.

Q Where were you born?

A I was born in Ashley, Pike County, Missouri.

The Court: Well, that is a good county.

Mr. Barclay: How long have you been using this mark which we call the tradename "Creamo Oleomargarine"—since what time?

A That mark was originated about 1902, when we first started in the manufacture of oleomargarine in this city in the Meinecike-Blanton Manufacturing Company.

Q That was the name of your original concern with which you were associated? A Yes, sir.

Q And your present Blanton Company was organized in 1904? A 1904.

Q Do you remember the time at which the Commissioner of Internal Revenue passed upon this trade-mark of yours—do you remember that occasion? A I do.

Q What was the title or the form in which that was submitted for approval by the Department referred to by these letters?

A That was in the form of a stencil—that was previous to the time we were putting up oleomargarine in subsidiary packages.

Q In small packages. You are the [manufacture] of oleomargarine and pay United States license, is that right?

A I do.

Q Is this a copy of the Internal Revenue license of your establishment which is displayed in the proper way at the factory?

A That is a copy like we have in our office at the present time. This copy reads 1911. The law requires us to keep that conspicuously displayed at all times. This is only a fac-simile.

The Court: There is no question about him having paid his license?

Mr. Houts: No; but I object to this as incompetent, and irrelevant, but no dispute as to the fact.

58 Mr. Barclay: At all times mentioned in this case has your factory been under the license which has been duly paid as the [manufacture] of oleomargarine? A It has.

Q The six hundred dollars a year license, is that right?

A Six hundred dollars a year.

Q Now has your establishment been inspected by the inspectors of the Internal Revenue Department of the United States during the entire period that we are speaking of?

A It has.

Q Have you as such manufacturer given the notices and the bonds and complied with the regulations that have been made for the administration of the business of oleomargarine?

A We have given a bond, we have given a notice to the Government and we have put up the signs as required by the law and regulations.

Q You filed your inventory as required?

A We filed an inventory once a year and reported monthly our sales under oath to the Government, the United States Internal Revenue Department.

Mr. Barclay: I wish, for the purpose of refreshing Your Honor's memory, to introduce in evidence the regulations regarding the labelling and branding provided by the Internal Revenue Department for manufacturers of oleomargarine as contained in regulations No. 9, revised July, 1907, of the United States Internal Revenue Department.

Regulations concerning oleomargarine; and the parts that I wish to call especially to Your Honor's attention are the regulations concerning the branding and use of ingredients contained in these regulations, including the provisions which declare that if any substances that is foreign or injurious is mixed with this product that it is subject to inspection, examination and rejection upon an inspection by this Internal Revenue Department of the United States; and that in case of dispute—Your Honor probably remembers—in case of dispute as to whether the ingredients—whether the matter intended for human consumption contains ingredients deleterious to the public health, in case of a doubt or contest the

decision of the Commissioner may be appealed from
59 to a Board composed of the Secretary of Agriculture, Surgeon-General of the Army and Surgeon-General of the Navy; and the regulations in regard to the branding, stamping and selling I offer except No. 5 on page 39, which has been [superceeded] by the sections that my learned friend has produced here.

Mr. Houts: So I won't be repeating these objections, I would like it understood that I am objecting to all of these regulations and testimony concerning the Internal Revenue Department.

The Court: I suppose you understand that objection?

Mr. Barclay: Yes.

The Court: They may be entered and they may be taken, all of them, when the case is concluded.

Mr. Barclay: This regulation No. 5—rather Section 5, under the head of "Manufacturers" on page 39 of the book that I am speaking of has been amended by a letter——

The Court: Just read in the record what you want to offer:

Mr. Barclay: I will. By a letter circular issued from the Internal Revenue Department of date February 24th, 1908, signed by John G. Capers, Commissioner, and approved by James B. Reynolds, Acting Secretary of the Treasury. And without reading all of it, I will read the amendments of that section, Section 6, Act of August 2nd, 1886, as amended, provides—then comes sections which I will not read, but I want to read the amendment to the regulation following that:

(Reading): In view of the above opinion, the provisions of regulation 9, revised July, 1907, at page 39, paragraph 2, subdivision 5—which is the matter I referred to relating to brick, prints and rolls of oleomargarine in oleomargarine are hereby amended to read as follows:

"Manufacturers are not permitted to put up oleomargarine in wooden, tin, or stone packages as subdivisions for domestic use. The use of paraffine wrappers or [cartoons] for prints or bricks to retain the flavor and form of the contents is permissible, provided such packages taken separately are not safe or suitable for transportation and are marked, stamped or branded as required by the regulations relating
60 to wrapper covering any brick, print or roll of oleomargarine.

Q Referring for a moment to this last change in the regulation, will you state in what manner the small packages contained in your larger packages manufactured for shipment and sale are now arranged—usually in accordance with that regulation? A Based on that regulation.

Q I show to you now a carton and ask you if that is the

form in which those small packages are arranged and your larger packages under this regulation? A Yes, sir.

Q Will you explain to the Court how that came to be done in the first place, how that came about—that method of treatment for your packages for the purpose of sale and what bearing it has upon the value of this trade-mark?

A Well, that regulation that you referred to there was issued at the request of my company. We found that to put out oleomargarine under the existing regulations we were precluded from carrying our products to the ultimate consumer in a way in which it would not be damaged. We found that there had been a ruling made to the effect that we could not encase it in anything that would protect it more than a paper. I went down to Washington and had a hearing before the Honorable Mr. Capers, who was then the Commissioner of Internal Revenue, and explained to him the facts, in a public hearing; and told him that we found that our product could not reach the ultimate consumer without it went in boxes or tubs, and under those conditions there was a great chance of people buying it from us in a tub and selling it for butter, and we thought if we could put it in this carton that that would obviate a great deal of fraud which is going on throughout the country in the distribution of oleomargarine.

Q Now in this form in which it is prepared are lesser packages in these large tubs contain a number of——

A Ten, twenty or thirty pounds.

61 Q The lowest limit being ten pounds. The form in which it is submitted to the trade includes the use of this trade mark, and who receives it?

A The ultimate consumer get this package just as it was.

Q What effect does that have upon the value of this trade mark which identifies this as your product?

A It makes it extremely valuable.

Q Now when you began the use of this form of sale—how long ago has that been?

A That dates from that regulation which was in 1908. Up to that time these packages were not recognized by the Internal Revenue Department. They were too strong. And the only way we could sell it up to that time was either in tubs in a very flimsy cloth or light tissue paper.

Q But the mode of selling which this regulation permitted gave you the opportunity of having the ultimate consumer know your particular brand of oleomargarine, which he knew was of a certain kind or quality, is that right?

A As packed at the factory.

Q That contains a pound (indicating carton)?

A That contains a pound.

Q You heard these letters of 1907 read regarding the

change—the slight change that was suggested by the Government. I will ask you what, if you remember, you did after that time?

A I might explain the use—the first use, instead of having the brand in that form, we took the plain carton and wrapped it in a label, we do that with certain packages today.

Q Now how was that treated?

A This [become] a part of the package by pasting it over a plain carton and making it all one sealed package; instead of this being loose on there, we take this label and paste it on.

62 Q That was the practice that prevailed before you had these particular cartons?

A That was a plain manilla carton wrapped in this label. We could not use that manilla carton previous to 1908.

Q Is this the kind that was described in that provision—paraffine regulation?

A Yes sir. And I will say, that some time before we got this ruling that we prepared these labels anticipating asking for that ruling.

The Court: You take a package or box, and this label that has just been identified you put that around the box?

A Around the box and make it a part of it, paste it solidly to the box.

Q So that this "The Blanton Company, St. Louis, Creamo Oleomargarine", would go on the box in the shape that this advertisement is now?

A Yes sir. And it is so before the consumer can get it he would have to break the seals on the box.

Mr. Barclay. You remember this date that was mentioned of the change of the regulation is the 24th of February, 1908. Now with reference to that date can you say what time it was approved, Exhibit B (indicating)?

A It was approved previous to that time.

Q It was approved previous to that time? A. Yes.

Q Have these cartons (indicating Exhibit A) in which the single pound packages have been enclosed from your factory been frequently subjected to examination by the Internal Revenue Department? A. They have.

Q No objection on their part at any time as I understand?

A No. They have a periodical inspection of all plants and [thay] take every die and every advertisement and reject them or approve them.

Q Your factory has been under close supervision of the Internal Revenue Department at all times, has it not?

A It has.

The Court: I take it that is true of all factories under the supervision of the Government inspection.

63 Mr. Barclay: We ask Your Honor's judicial notice of the fact that at the time this approval was made in 1907 there was a different administration of the Treasury Department from that which exists at the present time, and a change of administration throughout in the heads of these departments.

The Court: Yes sir.

Mr. Barclay: Now these regulations which I have mentioned contained, among others, this regulation, which is No. 4 on page 39:

"Under no circumstances will any manufacturer or dealer be permitted to impress, brand, or mark upon any print, brick or roll of oleomargarine, or on any wrapper covering the same, any device, word, or words calculated to induce the public to believe that it is a product of the dairy, or butter, even though the word "oleomargarine" appears on the same."

There are other regulations there on the subject of branding and stamping which are doubtless familiar to Your Honor and which I need not read.

The Court: I do not think I need to have the whole oleomargarine law read. Only ask him the questions as to whether this brand, which he claims is a valuable brand—whether that is a false brand; whether "Creamo Oleomargarine" is a misbranding under the statutes of the United States. As I understand the question, is where the department undertakes to change it or regulate it by saying that this brand is used or this mark is used is misleading in that way. That is all of the contention.

Mr. Barclay: Of course, we say that is so. If we were subject to the inspection of our label, the label would be valid under the regulation—the most important claim we make is that the label—that these labels are not the subject of inspection at all by the Bureau of Animal Industry, and that is because of the character of the product as I will explain in a few moments. The definition of oleomargarine is, as Your Honor knows, contained in the statute, which I need not especially read; and it is also contained in the regulations. One of our contentions is that the statute regarding the

64 Bureau of Animal Industry provides for the inspection of meat and [and] meat food products, but that oleo may or may not go in meat food products at all. It may be manufactured entirely from other products, and therefore is not within the language of the law—The Bureau of Animal Industry laws, and especially when Your Honor reads those laws and sees how far away they are from anything that might refer to the manufacture of oleomargarine. That is dealt with by a separate law. That is a matter of

argument which I will not go into now. I merely mention it so Your Honor may keep it in view in the progress of the trial.

I call Your Honor's attention to this group of correspondence: A letter of April 28th and a letter of April 26th, 1911.

Q I show you now certain originals and copies. Do you remember having received those from Dr. Brougham, the Inspector in charge, in 1911? A. I do.

Said letter of April 26th, 1911, offered and admitted in evidence is in words and figures as follows:

"United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
Washington, D. C., April 26th 1911.

Dr. J. J. Brougham,
St. Louis, Mo.

Sir:

Referring to your letter of the 20th instant, with respect to the enclosed wrapper for "Creamo Oleomargarine" submitted for Est. 668, you are advised that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" is not approved and should therefore be omitted from the wrapper.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division."

Said letter of April 28th 1911, offered and admitted in evidence is in words and figures as follows:

65 "United States Department of Agriculture,
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.
St. Louis, Mo., April 28th, 1911.

The Blanton Co.,
Gentlemen:

Referring to enclosed trade label submitted for approval to our Washington office, returned with the instructions that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" must be omitted.

See enclosed copy of letter signed by Rice P. Steddom, Chief Inspection Division.

Very respectfully,
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

Q Were these enclosed with this letter which came back to you from the Department (Indicating)?

A This was enclosed with that.

Q Were the others enclosed (indicating)?

A This was enclosed with that referring to label attached to letter).

Q This letter of date 26th of April, 1911, to Dr. Brougham by Mr. Steddom, Chief, Inspection Division, I understand you say this exhibit accompanied this letter?

A Yes sir and sent us a sample.

Q Exhibit C was attached to and enclosed with this letter of the 26th of April, is that right? A Yes sir.

Mr. Barclay: We offer this in evidence, Your Honor.

Said paper marked Exhibit C is offered and admitted in evidence in words and figures as follows, to-wit:

Blanton. Quality.
B
Quality. Blanton.
The Blanton Co., St. Louis, U. S. A.

66

Creamo
Oleomargarine

The goods herein contained are churned in the most complete and sanitary plant in the world. Every process is scrupulously guarded to produce a product both pure and perfect. Being richer in butter fats use only three-fourths as much in cooking and baking as butter.

U. S. Inspected and Passed
Estb. No. 668.

Mr. Barclay: "The Blanton Company, St. Louis, U. S. A." Your Honor had better look at that. (Hands same to the Court). Your Honor will notice this contains on the second panel "Creamo Oleomargarine", and in the third panel "The goods herein contained are churned in the most complete and sanitary plant in the world. Every process is scrupulously guarded to produce a product both pure and perfect. Being rich in butter fats use only three-fourths as much in cooking and baking as butter.

U. S. Inspected and passed Estb. No. 668."

Now this is the letter from the Chief of the Inspection Division, Rice P. Steddom, to Dr. Brougham regarding this wrapper. It is April 26th, 1911:

"Referring to your letter of the 20th instant, with respect to the enclosed wrapper for "Creamo Oleomargarine" sub-

mitted for Est. 668, you are advised that the statement "The goods herein contained are churned in the most complete and sanitary plant in the world" is not approved and should therefore be omitted from the wrapper.

Very respectfully,
(Signed) RICE P. STEDDOM,
Chief, Inspection Division."

Q This other letter, Exhibit D, has that objectionable language underscored in blue pencil? A Yes sir.

67 The Court: After you received that letter then you omitted it?

Mr. Barclay: Oh yes.

The Court: You excluded that part of it and left the other on?

Mr. Barclay: Yes sir.

Mr. Barclay: Now in everyone of those cases where the Government objected to those mentioned in the particulars described, your advertisements and these papers conform to that from that time on? A Yes sir.

Q As near as possible? A Always.

Mr. Barclay: Now this is a letter to the Blanton Company of April 28th, 1911 by Dr. Brougham, the Inspector in Charge here in St. Louis:

"Referring to enclosed trade label submitted for approval to our Washington office, returned with the instructions that the statement "The [good] herein contained are churned in the most complete and sanitary plant in the world" must be omitted.

"See enclosed copy of letter signed by Rice P. Steddom, Chief Inspection Division.

Very respectfully,
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

The Court: He complied with what they required?

Mr. Barclay: He complied entirely.

Now I want to go back a moment. After these directions by the Commissioner of Internal Revenue and by the Bureau of Animal Industry in the form that has been mentioned in 1907, how extensive did you attempt to extend the use of this trade-mark? What did you do towards extending its value by use? Just tell the Court and the gentlemen.

68 A Subsequent to the decision by the Internal Revenue Department to the effect that we could put up our goods under a carton, we centered our whole sales organization upon establishing our Creamo carton goods throughout this country. We have sold those goods from Boston to California. We have even sold out of Boston by our agents there up into

Maine and we have shipped them as far as the City of Mexico, exported them.

Q I will ask if your customers who have been mostly dealers in many cases, if they have frequently used your product under the name of "Creamo Oleomargarine" as leading elements in their trade?

A That is the only brand that we advertise and that is the only brand that we contract with our dealers to advertise for them; and the contracts are based upon Creamo Oleomargarine in cartons.

Q Just tell the Court what steps you have taken in your business organization for the advertising of this particular brand of Creamo Oleomargarine? What have you done towards extending the knowledge and publicity of that brand to the public?

A We have found that the best advertising is personal solicitation through women demonstrators, who take those goods and go from house to house and explain to the woman of the house how she can save money by using a substitute for butter, which will cost approximately half; and we impress upon the women these goods in this carton are absolutely sanitary, that they are inspected by the Government and that they should insist always to ask for Creamo Oleomargarine. That is the basis of our whole business.

Q Now between the time from the start of the use of this label and this brand of Creamo Oleomargarine up to 1911, to what extent had your trade increased in that particular?

A Well, I would say that it increased five hundred per cent. We had a very hard time starting under the old regime of tubs. I would say we put out a great deal in tubs under a stencil, but we hold that subsidiary to our carton goods. We are trying to get the carton goods to lead, and would rather sell one carton than five pounds of tub goods, because we want

69 the value that attaches to the brand to get to the women so they ask for our goods, and we can sell them on a basis that precludes competition to a certain extent.

Q Has this trade-mark acquired a value during these years in building up the business here you have described?

A Yes sir.

The Court: How long have you used this particular brand before you had notice to quit it? A About five years.

Q And that has continued in use?

A No, I made a mistake; five years in the cartons, but in 1904 to 1912 would be eight years.

Mr. Barclay: Eight years.

The Court: Were you using it when this notice was given you? A Yes sir.

Q How long before that? A Eight years.

Q In continuous use?

A The Blanton Company and I used it continuously with the Blanton Manufacturing Company—Blanton Manufacturing company has used it for eight years.

Q I will ask you this question: After all these corrections were made, and after you say you have conformed your actions to what the department required, how long did you continue to use that?

A Well, that question isn't susceptible of answering it because they would correct it from time to time and we were using it under corrections the department made.

Mr. Barclay: But no correction as I understand it, until these recently, within the last year, no correction applied to the use of Creamo Oleomargarine at all.?

A Absolutely none at all. But for instance that "Creamo" where they say we have to take that out, or go ahead and use the label with the Creamo left off, that doesn't apply to the panel we are now discussing.

70 Q These corrections occurred from time to time. The panel which was the original subject of approval never was criticized until very recently, is that right? A Never was.

Q Now can you state approximately how much of an expenditure you have made in the effort to enlarge and extend the publicity of this particular trade-mark which we call "Creamo Oleomargarine"?

A I can state the figures last year, and I can give you an approximation of the last ten years.

Q Well, that is what I wanted, as nearly as you can?

A We figure that it was over ten thousand dollars in the last year in publicity and advertising and the exploiting of this label—ten thousand dollars last year, and I would say that it goes back probably to smaller amounts, but it will probably average seventy-five hundred dollars for ten years.

Q You mean seventy-five hundred dollars a year?

A Yes—that is, including the men that we paid to do that and the women that we had.

Q Now do you have a department in your business which deals with this matter of publicity of this particular trade mark? A We do.

Q And is this the only one that you have advertised and exploited?

A We advertise none but the one brand; we have centered [out] whole force on this one brand.

Now at 12:30 P. M. a recess is declared until two P. M. of this day, at which time the following proceedings were had:

71 DAVID A. BLANTON,

in continuation of his testimony, testified further as follows:

Mr. Barclay: In exploiting this trade-mark, which is the subject of this suit, you have a department in your business in which that matter is confined, the publicity of the trade-mark? A Our advertising department.

Q What do you call it? A Our advertising department.

Q What has been best for recent years—for many years back, in promoting your business?

A Our Creamo Oleomargarine.

Q And I believe that you said that the average of the expense of that trade-mark during the last ten years—what would that be?

A I approximated it based on what it was last year. Last year the figures showed approximately ten thousand dollars. Now we have done more advertising. As the business grew we would do more advertising, and I would say there would be probably an average of seventy-five hundred dollars a year. That includes, of course, pay to demonstrators who go out and sell the goods, and who also demonstrate the article as I mentioned before. It is not what you would call newspaper advertising or bill boards or anything like that, but our publicity exploiting of that brand.

Q Now this product has never been sold as I understand from you other than by the name of oleomargarine attached to it—never has been sold otherwise?

A Never; it would be impossible under the Internal Revenue.

Q I understand; but as a matter of fact "oleomargarine" has always been upon these packages—large or small they were associated with the word "Creamo", is that right?

A The word "oleomargarine" must be on every package, and we are allowed a descriptive word by the United States Department of [Interior] Revenue in connection with the word "oleomargarine".

72 Q During all of this period that I speak of there has been no objection made whatever by the Internal Revenue Department to the use of the mode in which you have adopted for selling these goods? A None whatever.

Q Is the word "Creamo" in any dictionary or is it an arbitrary word you chose for that purpose?

A It is an arbitrary word, absolutely coined word.

Q It is not in the dictionary at all? A It is not.

Q What we have been dealing with so far in the matter of labels since the year 1908, when it was permitted to sub-

divide in the way you have described, has been one pound packages; did you afterwards submit to the Department a label of oleomargarine for the larger packages, two, three and five pounds? A I did.

Q And was that approved? A It was.

Q I show you Exhibit E, which was the [cartoon], as I understand, submitted for the larger packages?

A The larger packages are covered by a label as described this morning. This wrapper covers the two, three and five pound packages.

Q How were the two, three and five package sub-divisions put in your packages? A It is pasted to the carton.

Q Was this the letter received from the Department after having submitted that for examination?

A This was the letter.

Q That contains the name—the description of the number of pounds in the [cartoon]? A That was two pounds.

Q Were the larger ones for three and five the same as that for those number of pounds? A Same panel, same printing.

Q Same panel and same printing as all packages?

A Yes that was sent to the Department for getting the approval for printing and different subdivisions.

Q This Dr. Brougham calls our attention to the fact that this does not bear the stamp of approval there?

A We have a copy for that.

Q The same as this in all respects?

A It is a typewritten copy from which that label was made.

73 Q I see.

A We will put the original in which is the proper one after all.

Q This was the original you have here, and the other one was a copy taken from it afterwards, for use, is that right?

A Better let me explain.

Q Yes.

A I will say from time to time that these labels were approved, and then for some reason or other it became necessary—for instance, it became necessary in sending goods into New York—the New York State laws prohibit the giving away coloring for family use, and it became necessary at one time to change a panel on this "Creamo" label; and that was sent down and corrected, and it was re-approved with that correction; and I cannot say that this is the original caption of our Creamo label that is there, but I will say that this was sent down probably as a correction, which was approved, and it may and it may not be like that label. But if that label is in use it has been approved by the Government.

Mr. Houts: I object to that as a mere inference. I object to that and move that it be stricken out.

The Witness: I will say that that has been approved. May I say that?

Mr. Houts: I object to that. There is a way of proving that and that is by a letter.

The Court: Have you used any that has not been approved?

A Never; it would be impossible.

Mr. Houts: I object to that as a matter of opinion.

The Court: In all these matters that we have now did the Government approve them? A They did.

Mr. Houts: Well, I think the Government's approval has been by a document of some kind, and the best evidence would be by the production of that document. I object to his opinion that it was approved.

Mr. Barclay: This letter may throw some light on it. The letter is dated July 8th, 1912. Headed "United States Department of Agriculture, Bureau of Animal Industry, Local
74 Office. The Blanton Company, 115 Spruce Street, St. Louis, Missouri; Gentlemen: Enclosed find "Creamo Oleomargarine" Trade Label which has been approved by the Washington office. Very respectfully, James J. Brougham, Inspector in Charge. P. S. When the original Trade Label is finished, please send three copies to this office. J. J. B."

Q Please explain what is meant by that, so the Court will examine that? A That is the approval.

Mr. Houts: I object. Let him produce what accompanied that letter.

The Witness: Here is what accompanied that, was approved July 5th, and this was two days afterwards, on July 8th.

Mr. Barclay: The Court must infer the approval by the Bureau on the 6th of July, 1912, by the letter which he gets from the St. Louis office dated July 8th, 1912, enclosing the trade label which has been approved. I thought when I spoke of this that this was the original one; it seems it is not.

The Court: Well, have you got the trade label which that letter approves? A Yes sir.

Q Where is it?

A Here is the rough typewritten copy. Here is the copy of that previous label attached to that letter.

Q Now up to that time that I speak of—this letter which is July 8th, 1912, up to that time had there been any objection whatever by the Bureau of Animal Industry towards the use of the Creamo Oleomargarine as a trade mark?

A None that we ever were advised of.

Q And in the meantime what other measures had you taken besides the advertisements and the extension of your business intended to be accomplished by that—what other

steps had you taken towards selling the exclusive right to the use of this trade mark?

A We had the word "creamo" registered in the United States Patent Office as a proper word to use in connection with the use of oleomargarine.

75 Mr. Barclay: I want to offer the registration of this trade-mark for oleomargarine, passed by the Patent Office after a very considerable deliberation, the application being made in January, the 6th, 1908, the registration being allowed on the 9th of June, 1908. The registration of this was a trade mark under the United States laws concerning trade marks—

Mr. Houts: I want to object to the introduction of it on the ground that it has no bearing upon the questions involved here, and could confer no authority for the use of this label under the regulations and the laws governing meat inspection.

The Court: Let it go in subject to the objection. Said registration of trade-mark offered and admitted in evidence is in words and figures as follows, to-wit: "No. 69352

The United States of America

To all to whom these presents shall come:

This is to Certify, That by the records of the United States Patent Office it appears that the Blanton Manufacturing Company, of St. Louis, Missouri, a corporation organized under the laws of the State of Missouri, did, on the 6th day of January, 1908, duly file in said Office an application for registration of a certain

Trade-mark

for Oleomargarin,

that it duly filed therewith a drawing of the said trade-mark a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the Commissioner of Patents.

And, upon due examination thereof, it appearing that
76 the said applicant is entitled to registration of its said trade-mark under the law, the said trade-mark has been duly registered to The Blanton Manufacturing Company, and its successors or assigns, in the United States Patent Office, this 9th day of June, 1908.

This certificate shall remain in force for twenty years, unless sooner terminated by law.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this ninth day of June in the year of our Lord

one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

(Seal). (Signed) C. C. BILLINGS
Acting Commissioner of Patents."

"Trade-mark.

No. 69,352. Registered June 9, 1908.

The Blanton Manufacturing Company.

Oleomargarin.

Application filed Jan. 6, 1908.

Creamo

THE BLANTON MANUFACTURING COMPANY
Proprietor.

By FREDERIC A. SOUTHWICK
Attorney"

77 "United States Patent Office.

The Blanton Manufacturing Company of St. Louis, Missouri.

Trade-Mark for Oleomargarin.

No. 69,352. Statement and Declaration. Registered June 9, 1908. Application filed January 6, 1908. Serial No. 32,100.

Statement.

To All Whom It May Concern:

Be it known that The Blanton Manufacturing Company, a corporation duly organized under the laws of the State of Missouri, and located in the city of St. Louis, in said State of Missouri, and doing business at No. 115 to 123 Spruce Street, in the city of St. Louis, State of Missouri, had adopted and used the trade-mark shown in the accompanying drawing, for oleomargarin, in Class 46, Foods and ingredients of [foods].

The trade-mark has been continuously used in the business of said corporation since January 1st, 1905.

The trade-mark is applied or affixed to the goods, or to the packages, containing the same, by placing thereon a printed label on which the trade-mark is shown.

THE BLANTON MANUFACTURING COMPANY,
DAVID A. BLANTON, President.

Declaration.

State of Missouri, City of St. Louis, SS:

David A. Blanton, being duly sworn, deposes and says
78 that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said

trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

DAVID A. BLANTON.

Subscribed and sworn to before me, a notary public, this 2nd day of January 1908.

(L. S.) THOMAS RIELLEY,
Notary Public."

79 Mr. Barclay: How extensive has been the advertisement of this Creamo Oleomargarine trade-mark and articles sold under it provided it can be used as you described up to 1911? How extensive has that been advertised among your trade customers? I will show you this memorandum which may refresh your memory as to the mode in which has been done. Just tell the Court.

A In making contracts with our dealers we impress upon them the importance of advertising "Creamo Oleomargarine"; especially is this found to be desirable in states where there is no coloring allowed in oleomargarine—that is, if the consumer must color their own goods; especially is this true in New York, Pennsylvania and Iowa. In those states we have gone, and centralized our advertising campaign in those states. We have a wholesale dealer in the City of Des Moines, Iowa, who has advertised quite extensively in the papers in the State of Iowa, and quite extensively in the street cars. Every interurban car running in the City of Des Moines has carried, "Creamo Oleomargarine", "Creamo Butterine" advertising for a period of one year. In the City of Philadelphia we have a wholesale dealer who has something like five hundred retail dealers who sell our "Creamo Oleomargarine", and probably sell it exclusively; and they in turn are allowed a certain amount if they will advertise our goods; and they have advertised it quite extensively in that district. The same is also true of Lancaster, Pennsylvania, Johnstown, Pennsylvania, Altoona, Pennsylvania; and we have a factory branch in the City of Pittsburgh which covers two hundred towns contiguous in surrounding territory. Our policy in that market is to advertise, as

80 in other parts of Pennsylvania, because we find that people respond very readily to this advertisement, on account of the peculiar state laws which seek to have oleomargarine delivered in subsidiary packages. The same is also true of Iowa, where we have gone in quite extensively;

and New York has a peculiar state law that requires all oleomargarine to be done up in sealed packages; and our largest business is probably in the State of New York following that law. In New York City we have a factory representative.

Q Now all of these packages you speak of bear this brand?

A "Creamo Oleomargarine".

Q Now to an approximate degree what has been the extent of your business for several years past before this trouble began?

A Well, the business is growing; for the past year we did approximately nearly five hundred thousand dollars.

Q How much of that is attributable to the oleomargarine that you sell?

A Well, I would say probably, including the tubs, which are stenciled Creamo Oleomargarine—I would say two-thirds of that is Creamo Oleomargarine. Then we have a baker goods which we have put upon the market under Creamo Pastry, especially for pastry making, and Creamo Cake, especially for cake bakers. We have very large business on that in New York—that is, in the bakers line.

Q From your experience and knowledge of the business as a manufacturer, what would be the effect of changing this label, the one that is mentioned in the bill, in any substantial respect?

A Well, just simply be a slow death to the business.

Q Suppose that you were compelled to put the word "Creamo Brand" instead of "Creamo Oleomargarine" as it is now done upon these packages?

A Well, it would be a physical impossibility to put it upon the one pound package like that there, and it would wipe out the identity of the package.

81 Q Would it be physically possible to put on a carton like this with the words "Creamo Brand" without destroying the integrity of the brand as it is?

A You could not put "Creamo Brand" in the same type as the word "Creamo" is there; and also the word "Oleomargarine" in the same size type and get it on, it would be impossible; to make it any smaller would be to wipe out the original carton altogether.

Q Apart from those difficulties, what would be the effect as a matter of business in making a substantial change in an established trade-mark?

A Well, that would just do away with the brand altogether and start over on another word; we should have to take up the word and do all this work over and repopularize this thing.

Q Would this change that has been proposed and suggested in the mode of putting up these packages and the use of this

trade-mark—what effect would that have on the business you have built up? A It would wipe it out.

Q What, in your opinion, is the value of this trade-mark in the way in which you have been in the habit of using it in your business?

A I could not put any value that would be—it is only valuable to us; it would not be of any value to anybody else; I could not say—I will say this: That it certainly ought to be worth as much as we have spent on it. I could not duplicate it for any less.

Q Now when the questions first came up, after the dates which I have mentioned in which the department began to make claim upon you to make a change in this form, did you visit Washington and have an interview with the department officers there on this subject?

A Well, I submitted a written argument in our behalf before I visited Washington.

82 Q Did you have a hearing in 1903, in April, 1903, before the Department in Washington? A Not 1903.

Q I mean 1913? A Yes 1913.

Q Did you submit some suggestions to the department at that time? A I did.

Q Before whom was this hearing had that you speak of?

A I think the first hearing was before Dr. Melvin.

Q He is the head of the Bureau of Animal Industry, is he not? A Yes sir.

Q And then there was also a hearing— A The Honorable Solicitor.

Q His name is Coffey? A Coffey.

Q Was it before Mr. Coffey that you submitted this summary?

A The last summary was submitted to the Solicitor, and prepared for the Chief of the Bureau, who suggested it be heard by Mr. Coffey, as a matter of law he said, and he would rather have Mr. Coffey read it.

Q Have you always objected to the efforts of the Department to change your trade label "Creamo [Oleomrgarine]"

A I have always objected very strenuously.

Mr. Barclay: We would like to have before the Court his objections to the changes in the use of the word "Creamo" and the notice that he had received that its use must be discontinued.

Q Before that they had notified you that this had to be discontinued and gave you a time in which it was to be done?

83 A That is the last paper. The first paper is the important one. There was quite a discussion taking place, I would say twelve or fifteen months, and this was the important hearing, and the final paper was submitted to Mr.

Coffey in April of last year, about eleven months ago. Mr. Coffey had this under consideration about four or five months, and then we were told that if we would change our formula and make certain changes, which we figured we could not make, it would be passed; and we told him that we could not accept it.

Mr. Barclay: I want to offer in evidence a letter of the 25th of April, 1913, Exhibit I. This is a letter dated April 26th, 1913, to the Blanton Company, 115 Spruce Street, St. Louis, Missouri, and is as follows:

"April 26, 1913.

The Blanton Company,
115 Spruce Street,
St. Louis, Mo.

Gentlemen:

Referring to your letter of the 24th instant, relative to the use at Est. 668 of labels, etc., in connection with oleomargarine, bearing the word "creamo", you are advised that the use of labels of this character, which have been formerly approved, may be permitted, pending the ruling of the Solicitor of the Department on the subject. A copy of this letter is today being forwarded to Bureau Inspector in Charge, St. Louis, Mo., with instructions that he be [goberned] accordingly.

Very respectfully,

CHIEF, MEAT INSPECTION BUREAU"

84 Mr. Barclay: And this one of October 2nd, 1912, we offer in evidence. This is October 2nd, 1912, from Melvin, the Chief of Bureau of Animal Industry to the Blanton Company.

Said letter is marked Plaintiff's Exhibit J for identification and is in words and figures as follows, to-wit:

"October 2, 1912.

The Blanton Company,
115 Spruce Street,
St. Louis, Mo.

Gentlemen:

The Bureau is in receipt of your letter of August 15th and the statements contained therein have been carefully noted. It is believed that there is no authority in the meat inspection law or regulations for the use of names such as "Creamo", "Clovercreme", "Fulcreme", and "Extracreme", in connection with oleomargarine.

The meat inspection law provides that no meat or meat food product shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under

any false or deceptive name. The use of the names above specified is considered deceptive and misleading and the Bureau must therefore decline to continue permitting these names to be used in connection with oleomargarine. However, since the Bureau's approval was formerly given, reasonable time will be allowed your company in which to use the cartons, wrappers, etc., bearing these objectionable names, but you are requested to immediately submit to this office a statement showing the number of such cartons, wrap-
85 pers, etc., on hand and the length of time it would take to exhaust them.

Very respectfully,

CHIEF OF BUREAU".

The Court: I understand the answer to that letter to admit that permission was given to use the labels that were on hand at that time, when they were sought to be accepted—that is what I understood from the answer?

Mr. Barclay: Yes.

Mr. Houts: Yes.

Mr. Barclay: Well, on that latter proposition about which there is no dispute, as I understand it—

The Court: ,Sir?

Mr. Barclay: I say I think there is no dispute on that proposition. It might perhaps be well to introduce in evidence, however, the letters which were marked as Exhibits in the bill. One of them has been put in, and the other one we will put in now.

Said letter is marked Plaintiff's Exhibit K for identification, offered and admitted in evidence is in words and figures as follows:

86 "United States Department of Agriculture.
Bureau of Animal Industry,
Local Office.
924 Chemical Bldg.,

St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:

Referring to your letter of February 9th, relative to a copy of a letter to The Blanton Co. on the subject of a trade label "Creamo". You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this

subject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:

(Signed) JAS. J. BROUGHAM
Inspector in Charge."

87 The Court: Those are exhibits attached to the bill?

Mr. Barclay: They are; yes sir.

The Court: A part of the bill?

Mr. Barclay: Yes sir: Just consider them in.

Q Has there been an inspector of the Animal Industry in your establishment for a long time?

A There has been an inspector in there ever since the law went in force.

Q What is that gentleman's name?

A The present inspector?

Q Yes. A A. N. [Sankey.]

Q Your establishment is located in what part of the city?

A Second and Spruce Streets.

Q Tell the Court what sort of an establishment it is. What are your methods of doing business and what is the nature of the material you use for this particular brand of oleomargarine?

A We occupy a building with one hundred and fifty-two feet front by seventy-five feet deep, part of it is a ware house, and part of it is an eight story re inforced steel concrete building. The equipment consists of churns, vats and things —an equipment that is usual to a high grade oleomargarine factory; and the materials we use are all bought subject to the inspection of the Government.

The Court: I do not understand that there is any question raised in these pleadings about how this oleomargarine factory is run, is there?

Mr. Barclay: Except that it is intimated that the purpose of the brand is misleading and, of course, we want to show that the matter is conducted according to the best methods that he knows from a business point of view to carry on this trade.

88 The Court: I do not want to keep anything out of the record that you think ought to be in the record, but at the same time there is no question raised here, as I understand it, that this factory was not carried on as well as could be carried on practically and that the material used is the same kind of material that is used in all oleomargarine factories.

Mr. Houts: The answer is specific. We say that the use of that word is designed to induce people to think that there was a sufficient amount of cream in it. That is sufficient. So we don't say anything about how their factories run; no issue as to that; no contention about it.

Mr. Barclay: Tell the court about that (handing witness carton marked Exhibit L)?

A This carton has been the subject of approval, the same panel exactly as the one which we are trying to sustain. One of these panels was subject to revision on account of the change in the New York, and this came back after some corrections and suggestions on the part of the Department—it came back re-approved again.

Q Now when was that, how far back was that?

A February 27th, 1912.

Q Have you got one of those here? A Yes sir.

Mr. Barclay: We ask to have this marked as Exhibit L. and offer it in evidence.

Said [cartoon] marked Plaintiff's Exhibit L for identification, offered and admitted in evidence, is in words and figures as follows, to-wit:

89

Blanton. Quality.
B.
Quality. Blanton.
The Blanton Co. St. Louis
Creamo
Oleomargarine

Not made in a packing-house but in a special plant designed and completely equipped with every-modern appliance for producing high grade goods. Rigid inspection, and the most perfect scientific sanitary measures are observed by us at every step. The result is a product combining absolute purity and perfect uniformity.

This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness. After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors.

U. S. Inspected and passed under the Act of Congress, June 30, 1906. Establishment No. 668.

Admirably adapted to table use because of absolute purity and strict uniformity. Better than ordinary butter for cooking and baking, and effects a large saving in cost. Makes a

delicious cake, and delicate, crisp pastry. Ten to twelve ounces does the work of a pound of butter.

—Not Made in a Packing House—
90 Blanton. Quality.
B.
Quality. Blanton.
—The Blanton Company, St. Louis—"

Mr. Barclay: When the inspector of the Animal Industry began to work as such in your establishment did you make any objection to his so doing; if so, what, substantially, did you say on that point?

A We protested, that under the advice of our attorney, that oleomargarine was not a meat food product and, therefore, we were not subject to the meat inspection law.

Q What did they say about that? What happened?

A They said it would be necessary for us to have the inspection or our shipments interstate that would be stopped; that we would not be allowed to ship interstate.

Q What would be the effect of the refusal of the Department to permit you to use this label upon your business?

A What would be the effect?

Q What would be the effect upon your business if you were excluded from using this trade label as heretofore?

A Well, it would be very disastrous, both from a financial standpoint—

Q Yes. A It would be very disastrous.

Q It would represent a large pecuniary loss to your establishment? A It would.

Mr. Barclay: Now you may take the witness.

Cross Examination by Mr. Houts.

Q Mr. Blanton, this oleomargarine that you sell under this label "Creamo", does that contain any oleo or oleomargarine oil? A Does it contain at the present time?

Q Yes; what you have been selling under that brand.

91 Creamo brand? A It contains oleo oil.

Q In any considerable quantity?

A Well, it varies—a very considerable quantity.

Q A very considerable quantity?

A A very considerable quantity at present.

Q Does it contain neutral lard? A Yes.

Q What is neutral lard?

A Neutral lard is a lard produced from the leaf of a pig neutralized so as to take the taste and smell out of it.

Q Now as I understand you you say you have been using

this brand—"Creamo Brand", or "Creamo Oleomargarine", that label, for ten years? A Not that label; the stencil.

Q I mean that as a trade mark you have been using it for ten years? A For ten years.

Q You were then using that prior to the passage of the Pure Food Law and also prior to the Meat Inspection Law? A Yes sir.

Q Now, after the passage of the Meat Inspection Law did the Secretary of Agriculture take up with you the use of that name "Creamo Oleomargarine", didn't he? That was the subject of the correspondence between you and the Department? A Yes sir.

Q Now you have introduced in evidence a letter of July 6th, I believe it was 1912, in which you were notified of the approval of a label that had been submitted—"Creamo Oleomargarine"—that was July 6th, 1912?

A That is that typewritten?

Q. Yes. Now on August 8th, immediately following that, you received a letter in which the Department told you
92 that they had come to the conclusion that the use of that trade mark conveyed a false inference to the consuming public and that it should not be used in oleomargarine, didn't you? A That was our first notification.

Q The letter was dated August 8th, 1912?

A That is my recollection.

Q Now, without reading all of these letters that passed between you and the Department, after that time the subject of the use of that label was taken up and discussed either by letter or by personal talks between you and the department, that is true, isn't it? A That is true.

Q And they permitted you then to use up the labels that you had on hand? They issued orders to that effect, did they not, and advised you of that fact? A Oh, yes.

Q And the Department suggested [then] changes, did it not, that should be made in your label? A One change.

Q Well, they suggested, did they not, that the word "Brand" be used so that the three words "Creamo Brand Oleomargarine"—you could use that they said?

A In as prominent a type—all should be displayed alike.

Q Yes, those three words should be displayed alike. That was conditioned, was it not, upon your using at least ten per cent of cream? A They held that.

Q In your product?

A They held that I must use cream in the product.

Q To the extent of ten per cent? A Yes I believe so.

Q And the ruling of the Secretary of Agriculture was that if you used ten per cent of cream you then could use the words "Creamo Brand Oleomargarine" as a label, isn't that correct?

93 A Provided we would allow them to write that label the way they wanted us to.

Q Well, the only restriction they placed upon it was that each word should be given the same prominence, isn't that correct? A In the same type, yes.

Q Now you say that the addition of that word "brand" destroyed the value of the label? A Absolutely.

Q What is the reason of that?

A That is a great long trade story, and you could not appreciate the hardness or the difficulty in the placing of a well liked and popular brand before the public to put the "Brand" there; to my mind I think it would eventually result in the public's mind to make that label appear foolish.

Q Let me ask you: Didn't you contend before the department that the words "Creamo Oleomargarine" were nothing but a business label? A Absolutely.

Q And you contended, did you not, that it did not indicate to the purchasing public the constituents of your oleomargarine? A I did.

Q You did contend that? A Yes.

Q. And you contended, did you not, that the use of those two words was only of value as trade label or trade name?

A I didn't contend that, no; my contention has always been that oleomargarine is the name of the product.

Q Yes.

A And that, according to the United States Internal Revenue laws, we are allowed the privilege of putting some arbitrary word on our oleomargarine which will separate it and distinguish it from other grades of oleomargarine on the market, and that as long as we had the word "oleomargarine" on the product we had complied both with the meat inspection law and also the Internal Revenue law, which we had gone to the trouble of getting their approval in the use of this word.

94 Q Well, you contended, did you not, that word "Creamo" simply signified a brand?

A We contend that the word "Creamo" is an arbitrary coined word which meant nothing but a distinguishing mark to distinguish our goods from the other goods on the market.

Q Well, now isn't that the definition of the word "brand" isn't that the definition of it?

A Well, now that comes pretty close but you don't cover it all.

Q You know of a great many brand goods of some of these houses? A Oh, yes.

Q The "Buffalo Brand" gotten out by Scudder-Gale Grocer Company?

A Yes, but you don't catch my point; that I claim if the peo-

ple who popularized "Uneeda Biscuit" put "Uneeda Brand Biscuit"—and by the way biscuit is not the real name of the product contained in the box—if they were forced to do that they could not have popularized that label before the public like they have, for they would have had to carry such a load they would have had to give it up.

Q It would not change the meaning of the expression?

A Absolutely not, but it makes the label appear foolish. It has been very aptly said that to put the word "brand" any where on a label is like branding the word "cow" on a beautiful pastoral scene—we have a cow by putting the word "cow" underneath the picture of a cow.

Q You know, as a matter of fact, that practically all of these people in the grocery business used the word "brand" in connection with every brand, as "Buffalo Brand"?

A Never heard of that. If that is the fact why don't Ivory soap people put "Ivory Brand Soap", why don't Uneeda Biscuit put "Uneeda Brand Biscuit".

95 Q I am asking you what you know as a matter of fact—

A As a matter of fact I know from a merchandise standpoint that it is absolutely impossible—that is, my knowledge from a merchandising standpoint and a manufacturer—it would be absolutely impossible.

Q Now in selecting the word "Creamo", what was your purpose in choosing or coining that word?

A My purpose, at that time the oleomargarine industry was in its infancy. The butter interests were circulating stories to the effect that oleomargarine was produced from sewerage and dead horses. We found it necessary to do something to combat that belief and to convey to the women what the goods were we have; we must have a term that while not descriptive was suggestive.

Q Suggestive of what?

A Suggestive of cream. At that time we were using thirty per cent of cream in those goods, and we wanted to suggest the fact that this was not a dead horse but was a cream product.

Q And that has been the purpose ever since, hasn't it?

A Absolutely, ever since.

Q Now you have said that it absolutely would destroy the value of the label if the word "brand" was put there?

A Absolutely you could not merchandise it; you could not popularize it at all; it would kill it.

Q Now didn't you submit to the Department a number of labels with the word "Brand" upon them? A I did.

Q I will hand you— A Did it under protest.

96 Q Now I hand you what has been marked Defendant's

Exhibit 1, and ask you if that was not one of the labels that you submitted as a substitute for the labels which the Department objected to?

A I submitted that as a specimen to the Solicitors as one we were submitting to our dealers; if they thought we could keep our contracts and furnish them these goods without [loosing] its identity we would try it out.

Q Didn't you ask the approval of the Department of that label?

A We did; had to have the approval before we could put it on our goods.

Q I show you defendant's Exhibit 2. Didn't you likewise submit that?

A When we submitted this one we submitted four with the explanation that we wanted to submit these to our trade—the men we had contracts with—looking to maintain the integrity of this label; that we wanted to submit them to our trade to find out if we could still maintain our contracts with them and get by—did that later.

Q Did you submit these in letters?

A No; that was submitted in person to the Solicitor.

Q Didn't you send those by letters to the Chief of the Bureau of Animal Industry—with a letter in connection with them?

A Subsequently; but I understood you meant first, if that was submitted first.

The Court: Instead of mailing them you took them down?

A Took them down once and sent them down by mail later. I will say that it was understood that anything we did in this matter was without prejudice as to this present contention of ours.

97 Q Now after you had submitted these last labels which I questioned you about you received a letter, did you not, from the Department, dated May 31st, 1913? A Yes.

Mr. Houts: I will read Defendant's Exhibit 3 in evidence, May 31st, 1913.

"Y-11
May 31, 1913.

The Blanton Company,
St. Louis, Mo.

Gentlemen:

Referring to your letter of the 20th inst., relative to the inclosed sketch of wrapper, "Creamo Brand Oleomargarine," "Contains no Cream", submitted for establishment 668, you are advised that the words "Creamo Brand Oleomargarine", should be in the same size and style of lettering. In addition to this, it will be necessary that the following statements be omitted, since they are either misleading within the meaning

of section 11, Regulation 18, or are questionable: "Absolute Purity", "Better than ordinary butter for cooking and baking", "Ten to Twelve ounces does the [word] of a pound of butter", "Air Tight".

Approval is withheld pending receipt of sketches, corrected to conform to Bureau requirements.

Very respectfully,
CHIEF, MEAT INSPECTION BUREAU.

Inclosure 611."

A That label was never brought out; we never accepted that.

98 Q Then on June 20th the Department wrote you this letter, which I show you marked Defendant's Exhibit 4, did it not (hands witness same)? A Yes sir.

Mr. Houts: I will read this in evidence.

"Y-11
June 20, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 7th instant, and previous correspondence relative to the use of the word "Creamo", in connection with oleomargarine prepared at establishment 668, you are advised that oleomargarine containing not less than 10 per cent cream, may be labeled, "Creamo Brand Oleomargarine." These words should appear in uniform size and style of lettering.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION"

Mr. Houts: Then on October 27th in answer to a letter of yours the Department wrote you this letter, marked Defendant's Exhibit 5, did it not—that is October 27th, 1913?

A Yes.

Mr. Houts: That letter I offer in evidence and will read it as well as the others.

"Y-8, 133
October 27, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

99 Referring to your letter of the 15th instant making inquiry as to whether oleomargarine containing not less than ten per cent of cream may be labeled "Creamo" without the addition of the word "brand", provided same is accompanied by a statement to the effect that "Creamo" is a patented trade mark, you are advised that

the Bureau will insist that if the word "Creamo" is used same be followed by the word "brand" in the same size and style of lettering.

Very respectfully,

CHIEF, MEAT INSPECTION DIVISION".

The Court: What was the purpose of the word "brand"? What did they want that in for?

Mr. Houts: I can only say from hearsay, Your Honor.

The Court: I want to ask for information. What do they want with the word "brand" in there?

Mr. Houts: The idea of the Department was that by the use of the word Brand the word "Creamo to define "brand" and not define "oleomargarine".

The Court: On the "Creamo Brand"?

The Witness: That is the very point I make, that the public wants to know what Your Honor is asking. That is exactly the point at issue.

Mr. Houts: Now Mr. Blanton, I hand you letter dated January 31st, 1914, marked Defendant's Exhibit 6, and ask you if you received the original of that letter?

A Yes that is the straw that "broke the camel's back".

Mr. Houts: I offer that letter in evidence.

Said letter marked Defendant's Exhibit 6 for identification, offered and admitted in evidence, is in words and figures as follows, to-wit:

100

"Y-8, 133
Jan. 31, 1914.

FWM-ECH
The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 24th ultimo relative to the inclosed sketches of labels submitted for Est. 668, you are advised that these sketches are disapproved inasmuch as the word "Brand" is either omitted or appears in such location or size and style of lettering that it does not modify the term "Creamo". In no instance does the word "Oleomargarine" appear in lettering similar to the balance of the name. As indicated in previous correspondence it will be necessary if the word "Creamo" is used in connection with oleomargarine that the same be followed by the words "Brand" and "Oleomargarine" and the statement "Creamo Brand Oleomargarine" appear in uniform size, style, and color of lettering. If the product contains no cream it will be necessary that there appear in direct connection with the name the statement "Contains no cream." If cream is used in quantities not

less than ten per cent, the name "Creamo Brand Oleomargarine" need not be further modified

With reference to the statement "Over ten per cent cream" you are advised that exception is taken to the word "Over" in this statement, this being too indefinite and therefore misleading. The Bureau will offer no objection to the exact percentage of cream being stated on the label in connection with the name "Creamo Brand Oleomargarine."

101 Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and accompanied by information relative to the percentages of the various ingredients to be employed in the preparation of the products for which the labels are intended.

In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is today being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the Bureau stamp of approval and number.

Very respectfully,
ACTING CHIEF OF BUREAU.

Inclosure 221."

Mr. Houts: Now after—

The Witness: May I explain why we could not comply with that letter?

The Court: Yes.

A He asks us to do something that is a physical impossibility. He asks us to state the exact percentage of cream in these goods. Cream being a liquid, goes into our goods—it is only solids that we can absolutely save; cream being a liquid, going over these goods, it will be impossible for a chemist to take our goods and say, and we couldn't say whether ten or twelve or fifteen per cent of cream, and we wanted a carton with safety we wanted to say over ten per cent. In that letter—the idea was to make us say something on that label that would be a physical impossibility

102 for us to sustain; and the whole treatment is so arbitrary that we could not—the whole treatment has been so arbitrary that it is a physical impossibility to comply with the stand that the department has taken on this matter, an absolute impossibility.

Mr. Houts: You have always understood, have you not, that the department did not require you to state the percentages of cream if you had over ten per cent and if you used the word "brand" in the label? A We have always understood.

Q I say you understood that?

A We have always understood that they had nothing to do with our formulas whatever.

Q That is not the question. I am asking you as to your understanding of the Department's position?

A We never understood the Department's position on anything.

Q At least in 1913 you understood that they would permit the label "Creamo Brand Oleomargarine" provided you had at least ten per cent of cream, did you not?

A But back in 1908 they permitted something else.

Q Now answer that question. I am getting down to 1913.

A Well, I will say that various members of that Department permit one thing, another member does not permit the same thing, and we don't know where we are at. In these various letters the Solicitor says our labels are all right; the clerk in the Bureau office says different. The one that rules was the last letter; is the one we have got to go by.

Q Well, according to the last information that you had at least, put it that way—the last advice that you had in writing from the Department, you understood that if
103 you put ten per cent of cream in your oleomargarine you could sell it under the label Creamo Brand Oleomargarine without further qualification, didn't you?

A That was the opinion of—

Q Just answer that question, if you had that understanding under that letter?

A No, I didn't have that understanding. So many different understandings down there you couldn't get two alike.

Q I asked you simply if you got that understanding?

A I never got any complete understanding at all; because the Solicitor said one thing and the other Department said another, and they would not allow the local inspector to say anything.

Q Now, as a matter of fact, your "Creamo Brand" or "creamo oleomargarine" has had varying percentages of cream in it, hasn't it? A Certainly; you have got to have.

Q Some of it has had no cream at all, isn't that true?

A Certainly, absolutely right.

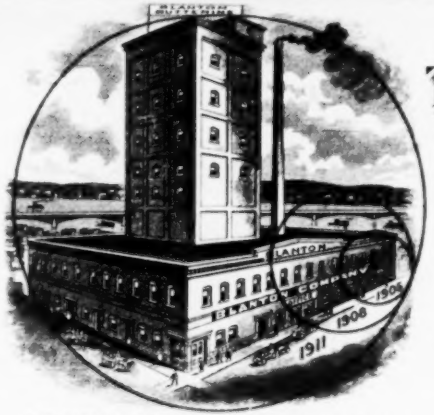
Q You use skimmed milk?

A Absolutely, and get a better product than I can from cream.

Q And that has all been sold under the one name, "Creamo Oleomargarine"?

A Absolutely, certainly. We sell this under the supervision of the Internal Revenue Department.

Q Now in connection with your business you use letter-heads and advertising—you have used letter-heads as follows, have you not? "Executive Offices: The Blanton Company.



THE FASTEST GROWING PLANT IN THE WORLD

SALES DEPARTMENT

THE BLANTON COMPANY

CHURNERS OF

Creamo

THE ONLY

FULL CREAM BUTTERINE

BLANTON · QUALITY · B · QUALITY · BLANTON ·

113 TO 131
SPRUCE STREET SAINT LOUIS

Churners of Creamo", that word "Creamo" the same style and type as in your label, and under the word "Creamo" you had the words "The only Full Cream Butterine"?

104 A That is right

Q You use that today?

A Will you allow me to qualify that?

Q Anyway in accordance with the facts?

A We have used that form the last eight years. That form was originally taken from the cheese industry. At that time we were using a cream milk that was full cream, and when you make cheese from a "full milk cream" they call it a full cream cheese. Our competitors at that time were using a skimmed milk, and we wanted to bring out the fact in our literature, as we assumed we had a right to so qualify our goods, that we were using whole cream milk. You don't understand that, because you are not in the cheese business, but that don't mean it is a solid cream and you can pick it up like butter.

Q With that explanation, as a matter of fact, this letter-head has been used and is still being used by your company in its transactions with its customers, is that not so?

A Certainly. We never assumed that the Department had any inspection over our letter-head; we never took that into consideration.

Q But I say this has been used in the advertisement and sale of the Creamo carton?

A Yes, it has, and I am only sorry it has not been used more.

Mr. Houts: I would like to have one of those letter-heads in evidence.

Mr. Barclay: We will give you one.

Said letter-head offered and admitted in evidence is in words and figures as follows, to-wit:

105 Mr. Houts: Now you have a number of brands besides "Creamo Oleomargarine", have you not?

A O yes, we have quite a number.

Q What different brands have you? A Well, we have got what we call our "Margo", our "Cunado", our "Creamo Bakers Special" and our "Creamo Cake Special", which are our leading brands. From time to time we have made up special brands, such as "Golden Rod". We have another brand called "Blanco", which by the way were qualified.

Q Didn't you have also a brand known as "Clover Creme"?

A That has been withdrawn several years ago.

Q You also had a brand called "Fulcreme"? A We had that, but that has been withdrawn.

Q That has been withdrawn too? A Yes sir.

Q How long ago? A When our attention was called to the

fact that these brands might be considered misleading we then told the Department we would withdraw it immediately.

Q That was in 1912, was it? A Yes.

Q And you also had a brand called "Extracreme"? A We had that.

106 Q Did you withdraw that, too?

A We withdrew that. When it was intimated they might be misleading we told the Department that we wouldn't spend any money in advertising them.

Q And you withdrew all except the word "Creamo"?

A Yes, which was the one that was the least misleading.

Q The least misleading?

A It was the least misleading, and in which we had spent a lot of money in popularizing and establishing it.

Mr. Houts: I believe that is all, if Your Honor please.

The Court: Anything further, Judge Barclay?

Re-Direct Examination by Mr. Barclay.

Q This letter which was referred to by the Department in May, 1913—did you write any letter about that time—did you write a letter to the Department in which you describe the nature of your discussion with them, in regard to its being done without prejudice to your rights, whatever they might be?

Mr. Houts: Let him put the letter in.

Mr. Barclay: I want to put the letter in evidence. There may be some matters there not necessary to this particular feature.

Q This was the letter? A Yes.

Said letter to the Bureau of Animal Industry, Washington, D. C., Dated May 20th, 1913, was read in evidence and is in words and figures as follows, to-wit:

"May 20, 1913.

Bureau of Animal Industry,
Washington, D. C.

Gentlemen:—

107 We have yours of May 13th, and note you say concerning our Creamo Oleomargarine label "that in view of the fact that the product contains no cream the designation "Creamo" is considered misleading."

In keeping with your letter we have decided to return to the use of cream in these goods and make our formula conform to your interpretation of this label. We assume by using cream we will be able to use our label as originally approved by you. In making this change we are doing so without prejudice as to any future action.

Our attorney is of the opinion that our statement to which you refer should not have been submitted as a legal presenta-

tion of the case. It will be remembered that the statement was originally prepared for Dr. Melvin, but was at his suggestion made to the Honorable Solicitor.

We note your reference to the law as to trade names which are false and deceptive. If "Creamo" is a trade name and is synonymous with the word "cream", then we are building a business on falsehood and deception, which is neither right nor good business. If, on the other hand, "Creamo" does not spell and necessarily mean "cream", and is not a trade name, then we are advised that its use is legal and we are within our rights.

There seems to be an honest difference of opinion between us, and we suggest it may be settled by an amicable court proceeding which will be final, as it is not our desire to build up this brand under a cloud. We hope in time to make this brand very valuable, and to do so under these conditions is most undesirable.

We are submitting a new label in keeping with the
108 suggestion in your letter, which we will use should we be unable to put out a competitive commercial product under the changed conditions; this label to be used without prejudice as noted above.

If this label is satisfactory we will ask you to kindly approve it.

Very truly,

THE BLANTON COMPANY,

1M (Signed) D. A. BLANTON, prest."

Mr. Barclay: Now the word "Fulcreme" as I understand, in the dairy industry means cream from which no milk has been extracted, is that right?

A That is right. At the time we advertised it was at the time that the Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor—the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk. We did not fall into that line until several years after our competitors had fully established the quality of those goods. And it is a well known fact in manufacturing circles today that a good pure skimmed milk will produce as much flavor in a neutral—more so than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid. That is the scientific aspect of the question. This aspect of the question has been developed since we established that line of our stationery.
109 We do not like to change our stationery any more than

we like to change our labels. Therefore we continued to use it. It is expensive, too. Those plates cost money. To make those changes costs a great deal of money.

Q Did you in view of the interpretation which the Department had placed, if you had been permitted to use your regular trade-mark [you,] been willing to use at least ten per cent cream?

A We were willing to do anything that would pacify this department. We wanted to comply with all their rules and regulations and at the same time we wanted to maintain our business without any big financial loss. We went down there and made that plea to the solicitor, and told him that to do the thing that his complaints were asking us to do would cause us great financial loss, and if we could maintain the integrity of this label in a way to meet their requirements and at the same time not lose its identity, that we would be only too glad to do so; but that if they wanted us to do impossible things, and change the whole aspect of this label, that we must be shown finally in court; that we could not lose this property without finding out for certain whether it was legal or not. I will say that there is a great big question involved as to whether there is any inspection of labels. Our attorneys tell us that there is no such thing as inspection of labels under this law.

Mr. Barclay: Don't bother with that. A That is all.

Mr. Houts: The Department advised you, did it not, Mr. Blanton, that you could use the word "Creamo Oleo-
110 margarine" if you would also put a statement on the same label that it contained no cream, did they not?

A They did.

J. F. OBERWINDER,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation?

A J. F. Oberwinder; age thirty; advertising Dairy Advertising Company, in this city.

Q How long have you been in the advertising business?

Mr. Houts: If it will shorten this examination, I will say to Judge Barclay I have no testimony upon that at all.

Mr. Barclay: I wish to offer a little, because my client is very anxious about one feature. Will you admit him to be an expert?

Mr. Houts: Anything you say.

Mr. Barclay: I do not know myself.

Q How long have you been engaged in that business?

A Since 1901.

Q Have you had considerable to do with this trade-mark that is mentioned in this case?

A I placed the first advertising they ever placed, and have been identified with it ever since.

Q And how much advertising has been done that you know of—through your own agency?

A To specify the dollars and cents or give a financial way?

Q Both?

A In dollars and cents I don't know because the
111 part we played in it in a valuation a minor part, what we spent.

Q Well, state it otherwise?

A Oh, we have done practically all of the advertising from California to New York and from Wisconsin to the Gulf in various forms.

Q What has been the trade product you have advertised?

A Creamo Oleomargarine.

Q Do you know what the value of this trade-mark is, in your experience in advertising, what the trade value of it is?

A The only value is the trade-mark altogether.

Q Could you approximate what the value of that would be?

A No, I haven't—not Creamo—I have the other articles, because I have known what has been offered for them.

Q You couldn't place any value on this?

A No; it would be many times greater than they have spent, many folds.

Q It would be at least as much as they have spent?

A Many times more.

Q What would be the effect upon a trade-mark or trade-name such as this of changing its character or form presented to the public? A It would be worse than starting over.

Q Would it be damaging and injurious financially?

A Absolutely damaging.

BRUCE DOUGAN,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation?

A Bruce Dougan.

112 Q Your line of business, Mr. Dougan?

A I am in the advertising business.

Q With what concern? A Western Advertising Company.

[A] [Yow] long have you been engaged in advertising?

A About eighteen years.

Q Do you know anything about this trade-mark and to what extent it has been advertised? A Yes I know.

Q State your personal knowledge about that?

A Well, they advertise in the cars in St. Louis. We control the street car advertising. They advertised with us to some extent.

Q How long has that been going on?

A I think they advertised one or two years with us, I don't remember just how much longer.

Q Are you acquainted with the nature of the trade-mark and the business that they carry on? A Yes.

Q Are you able to approximate the value of that trade-mark from an advertising man's point of view?

A No, I cannot say how valuable it is.

Q What would it be with respect to the cost that had been expended in giving it publicity?

A Well, that would depend on the character of the goods and way it is selling, and so forth. Sometimes the goods may be advertised extensively and yet have value, but the way this is going I would say it is a rather valuable trade-mark.

Q What would the effect upon the trade-mark, such as we have seen here, the one presented in the bill, if the form of it was changed in a substantial manner—what would be the effect upon it with the consumer, with the public, as to its value?

A That would seriously interfere with it unless it was
113 advertised again and the same process gone over.

Q Practically beginning over with a new trade-mark?

A Yes sir.

Cross Examination by Mr. Houts.

Q Would that be true if the word "Brand" merely were added to it?

A Well, it would depend on the reformation of it entirely. I don't know how hardly to answer that. It would depend a great deal on the re-shaping, how it was re-shaped and re-colored, that would make a difference. I believe it would interfere some.

FREDERICK A. SOUTHWICK,

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q State your name, age, residence and occupation?

A Frederick A. Southwick; St. Louis; occupation advertising manager of the Blanton Company.

Q You are over twenty-one? A Slightly.

Q How long have you been with the Blanton Company?

A Since May 1st, 1906.

Q Have you had anything to do with the publicity department?

A I have had practically the entire charge of it during that time.

Q State during the time that you have been in charge the amount of publicity that has been given to this trade-mark that we are talking about in this case?

A We have advertised in the newspapers and the
114 street cars; we have advertised by direct solicitation; we have advertised by trade circular letter work; in fact, we have used almost every conceivable means of popularizing the goods.

To what extent have you increased the business represented by this trade-mark during the time that you have been in this position?

A Our business has increased since I came with this company practically four and a half or five hundred per cent.

Q And how much of that has been in this product marked with this trade-mark "Creamo Oleomargarine"—how much of it has been for that?

A We claim that that has been—in fact, all of it, if I understand the question right, that has been the foundation of the increase.

Q Is that the only product of your department you have advertised, the Creamo?

A The only one we have expended any money on.

Q How much has been expended during the time you have been in charge of the publicity department by the Blanton Company in the advertising of this Creamo Oleomargarine?

A Basing it on the last year, the way I can put it, between eight and ten thousand dollars per year.

Q For how long a period to your knowledge?

A Well, we started the first two years that I was with the company this package proposition was working out, and when we finally got the package on the market then we started in to push the goods.

Q Has this business been popular with the dealer?

A It has.

115 Q The one marked with this trade-mark? A It has.

Q How much experience in publicity have you had apart from this business of the Blanton Company?

A I have been in advertising business upwards for twenty years.

Q What forms have these advertisements taken in different parts of the country—a great many forms?

A I don't know that I know just what you mean by "forms"?

Q I mean in what way have you advertised?

A Newspapers, street cars, bill-boards, circular work, direct personal solicitation by demonstrators.

Q Have you any means of determining what is the value of the trade-mark under a reasonable approximation of it?

A Well, from a general knowledge of trade-marks I know that an advertised brand is the chief asset of any business, and it is worth many more times, often estimated, than all the money invested in plant machinery or the entire facilities that the company may have.

Q The way in which this trade package is used in reaching the ultimate [comsumer] in the form through which it comes from the factory, does that have any effect upon the value of the trade-mark? A It certainly has; it has all of the value.

Q Have you been able to make an estimate of the value of that from your previous experience in dealing with trade-marks, the present value of the trade mark to the Blanton Company as a business?

A If I had that trade-mark I would not take a half million dollars for it today.

Q If that means that is what you think it is worth—

A That is what I think it is worth. It is worth more
116 than that because it is a continual growing worth, and a worth that can be made more valuable every year.

Q From your experience in advertising and dealing in matters of this kind of publicity what would be the effect if you know of changing the form in the manner suggested by the Government, putting "Creamo Brand" on one line, and the same short letters "Oleomargarine" below?

A In the first place it would make it foolish, ludicrous and absolutely destroy its value as a trade-mark.

Mr. Barclay: That is all.

Mr. Houts: That is all.

WALLER EDWARDS.

being duly sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Barclay.

Q Please state your name, age, residence and occupation, Mr. Edwards?

A Waller Edwards; 5583 Bartmer Avenue; advertising agent.

Q How long have you been engaged in advertising?

A About seven years, nearly eight years.

Q You have had a large experience besides, in the publishing business before that, and newspaper business, too?

A Yes sir.

Q You have had a great many kinds of experience in the domain of publicity? A Yes.

Q Are you acquainted with this trade-mark "Creamo Oleomargarine"? A Yes sir.

117 Q How long have you known that?

A About six or seven years.

Q With what concern are you now connected in the advertising business?

A The Nelson Chesman, and College & Commerce of Finance, St. Louis University.

Q You are a lecturer on that subject? A Advertising.

Q Nelson Chesman is one of the largest, if not the largest establishment of the kind in the United States?

A One of the largest advertising agencies.

Q Now are you acquainted with this trade-mark that is the subject of this action? A Yes sir.

Q To what extent has that been given publicity, or to what extent has that been advertised so far as you are aware?

A Well, it has been advertised since I have known it more or less extensively in the line of general publicity, in the line of direct sales promotion over the greater part of the country —in fact, all over the country.

Q By that you mean the United States? A Yes sir.

Q Have you any opinion from what you know of the use that has been made of it and the publicity given to it as to its value as a trade-mark?

A I would consider it very valuable.

Q Have you any definite opinion as to what its value is?

A Well, from an examination that I made of this subject once with a view of placing advertising for this concern, I would say that in my judgment the value of this trade-mark would be approximately two hundred and twenty-five or two hundred and fifty thousand dollars.

Q I am speaking, of course of the trade-mark "Creamo Oleomargarine", you understand, only? A Yes sir.

118 Q You have seen the cartons or the forms in which this is presented to the trade, have you not?

A I have; yes sir.

Q And you understand that the purpose of this arrangement is to reach the ultimate consumer in this form, do you not?

A Yes sir.

Q Now assuming that, what would be the effect, in your opinion, of changing the form of this so it would be "Creamo Brand" in the same size letters and "Oleomargarine" in the same size letters instead of what appears there now—what would be the effect in your opinion, upon the value of that trade-mark?

A Well, practically to destroy the value, because the work

that has been done by this company in pushing and advertising this package and the brand in its present form, would have to be done all over again; that is a common experience in advertising.

Q Can you tell His Honor, or perhaps the rest of us who are not experienced in the effect of publicity upon the public, what is the basis of that opinion?

A Well, I base my opinion on the experience I have had in advertising of brands which have been changed, and found that it was like introducing an absolutely new proposition; that you could not rely for any growing advertising value upon the good will of the old brand. The new would have to stand on a base separate to itself.

Mr. Barclay: That is all.

Cross Examination by Mr. Houts.

Q Mr. Edwards, give me an illustration of some brand that has been changed in that way upon which you base
119 that opinion?

A Why "Faust Coffee" which was changed to "Faust Blend".

Q That was not a substitute of the word "Brand"?

A It wasn't a substitution of the word "Brand" but it was in effect.

Q Blend and [doffee] don't mean the same thing? A No.

Q That was an entire change. Do you know of any illustration where the word "Brand" was used?

A The word "coffee" was used in both instances. The "Faust Blend" operated as an entirely new coffee.

Q Your "Blend" is different from ordinary coffee; it means a combination, doesn't it? A Yes, but it was the same coffee.

Q Well people didn't know it though, did they?

A No, now when they called it "Blend"; that was changing the brand.

Q In the word "brand"—do you know of any case where the word "brand" was added and injured or destroyed the value of it? A I don't know if I can state right off-hand.

Q No. Now take this label that is in the bill of complaint, filed with the bill of complaint, what effect would it have upon this if now were added there the words "contains no cream", leaving the label as it is except adding the words "contains no cream", what effect would that have?

A Well, to suggest to the purchaser something that he had never thought of before.

Q You mean by that that it would remove the idea that there was cream there, isn't that what you mean?
120 A No, it would put in his mind an idea—

Q That there was no cream there?

A That there was no cream there, and that he had never even thought of it before as having cream.

Q The effect would be to indicate to him that there was no cream? A Naturally.

Q Well, using it this way with the word "creamo", does that suggest to anyone that it has cream in it?

A I would say not. I believe the first intimation in the mind of the purchaser there would be it is below—something like the label of a certain brand of cigars and put in there—

The Court: If the oleomargarine isn't any better than these Creamo cigars what would you have to say about that?

(No response).

Mr. Barclay: The Plaintiff rests.

Plaintiff Rests.

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121 (Testimony for Defendants.)

Thereupon the defendants to sustain the issues upon [then] part offered and introduced evidence as follows, to-wit:

Mr. Houts: I want to introduce paragraph 1 of Section 8 of Regulation No. 3, governing the meat inspection, United States Department of Agriculture, as amended, effective May 1st, 1908. That paragraph, Your Honor, is as follows:

"Section 8, Meat Food Products.—Paragraph 1. A meat food product, within the meaning of the meat-inspection act and of these regulations, is considered to be any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable and definite portion of the finished food."

Mr. Houts: Now I want to introduce in evidence regulation 18, and particularly section 2, Section 10, Section 11 of Regulation 18. I will put in the whole Regulation 18, but those are the ones I want to call Your Honor's attention to particularly. These are set out in my answer, and I won't read them here to your Honor now.

Said Regulation 18 offered and admitted in evidence is in words and figures as follows, to-wit:

"Regulation 18. Trade Labels.

Trade Labels.

Section 1. Upon each can, pot, tin, canvas, or other receptacle, or covering containing any meat or meat food product, which meat or meat food product does not bear the marks "Inspected and Passed," there shall be securely affixed, under the supervision of a Department employee,

122 a trade label before such meat or meat food product

leaves an official establishment. This trade label shall contain, in plain letters and figures of uniform size, the words, "U. S. Inspected and Passed," the number of the official establishment at which the meat or meat food product is last processed, and the true name of the meat or meat food product contained in such package. The words "under the act of Congress of June 30, 1906," may be placed upon the label after the words "U. S. Inspected and Passed." An inspector shall not allow trade labels to be affixed until he is satisfied that the contents of the package are sound, healthful, wholesome, and fit for human food, in accordance with the statements on the label.

Proofs to be approved etc.

Section 2. Duplicate copies of each trade label in the form of sketches or proofs shall first be submitted to the Department, and no trade label shall be used until a sketch or proof thereof has been approved. After trade labels are printed from approved proofs or sketches they shall be forwarded in triplicate to the Department for approval and filing.

When not to be used.

Section 3. No trade label bearing the words "U. S. Inspected and Passed", or any abbreviation or simulation thereof, shall be used on meat or meat food products which have not been inspected and passed under these regulations, and no trade label bearing the inspection legend, or any abbreviation or simulation thereof, shall be placed upon meat or meat food products except under the supervision of an inspector.

Tin containers embossed or lithographed.

Section 4. Tin containers, embossed or lithographed with the label as prescribed in section 1, will be considered
123 as bearing trade labels. On and after October 1, 1908, all sealed tin containers must have the number of the official establishment where packed embossed, lithographed, or printed thereon.

Essential features.

Section 5. The essential features of a trade label are as follows, and shall appear upon each label:

The true name of the product.

The inspection legend.

The establishment number.

The inspection legend.

Section 6. The inspection legend "U. S. Inspected and Passed," or an authorized abbreviation thereof, and the official establishment number in plain characters or uniform size, which shall be in proper proportion to the general letter-

ing of the label, must be separately and prominently embodied in all trade labels.

Stickers, detachable device, etc.

Section 7. In the case of meat contained in cartons, or in wrappers of paper cloth, or other similar substance, the inspection legend and the official establishment number may be embodied in a sticker or seal of proportionate size prominently displayed with the trade label but not necessarily a part of the trade label, such stickers or seals to be approved by the Department of Agriculture. It is not permissible to affix to meat or meat food products a detachable device of any kind which bears the inspection legend.

Export labels and brands

Section 8. While labels to be affixed for foreign shipment may be printed in a foreign language, the same rules shall apply with reference to false labeling and the naming of ingredients as shall apply to goods prepared for
124 domestic use. The inspection legend and the official establishment number must in all cases appear in English; but if desired they may in addition, literally translated, appear in the language of the country to which the package is destined.

Products prepared for another establishment.

Section 9. Paragraph 1. When an article is prepared by an official establishment for another firm or individual if the name of the said firm or individual is to appear upon the label the statement must be made that the article was "prepared for" or "manufactured for" the firm or individual. Names of subsidiary companies which have legal entity may be used without the prefix "prepared for" or "manufactured for".

Paragraph 2. When a firm or individual not operating under Federal inspection desires to reship inspected and passed meat that has been processed only under Government inspection and is eligible under these regulations for interstate shipment he may affix to the package the following statement: "The meat contained herein has been inspected and passed at an establishment where Federal inspection is maintained."

False or deceptive names.

Section 10. No meat or meat food products shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted.

Misleading pictures designs or devices.

Section 11. No picture, design, or device which gives any false indication of origin or quality shall be used upon any label. The law prohibits any statement, design, or device false in any particular regarding the virtues or properties of the materials contained in the package.

125 The principal ingredient.

Section 12. A meat food product when composed of more than one ingredient shall not bear a trade label with a name stating or purporting to show that the said meat food product is a substance which is not the principal ingredient contained therein, even though such name be an established trade name.

Added Substance.

Section 13. A meat food product that contains a substance or substances, including water, added for the purpose of adulteration and which lessens its food value shall bear a label stating that such substance or substances have been added.

Statement of weight.

Section 14. When any weight is given upon the true container it must be the correct weight, and it must be stated whether this weight is the net weight or the gross weight."

JAMES J. BROUGHAM,

being duly sworn on behalf of the Defendant, testified as follows:

Direct Examination by Mr. Houts.

Q State your name to the Court, please?
A James J. Brougham.
Q Where do you live, Doctor? A 1333 Mont Clair Avenue.
Q What is your official position, Doctor?
A I am Inspector in Charge of the Bureau of Animal Industry and work in St. Louis.
Q How long have you held that position?
A In St. Louis since January, 1902.
Q Before that did you hold an official position?
126 A At National Stock Yards from 1892 to 1902, when I was transferred over here.
Q Now are you familiar with the plant of the Blanton Manufacturing Company in St. Louis? A Yes sir.
Q What is its designation in your Department?
A It is known as Establishment 668.
Q Now you have had correspondence, have you, with the Blanton Company? A Yes sir.

Q Certain letters have been read here that were written by you to that company? A Yes sir.

Q And among others letters in which these labels that we have been talking about were disapproved by your Department? A Yes sir.

Q And you advised the Blanton Company of that fact?

A Yes sir.

Q Now attached to the bill of complaint in this case is a letter, Doctor, which is as follows: It is dated February 10th 1914, and is on the letter-head of the United States Department of Agriculture, Local Office:

United States Department of Agriculture,
Bureau of Animal Industry,
local office.
924 Chemical Bldg.,
St. Louis, Mo., February 10th, 1914.

Judge Shepard Barclay,
Rooms 311-312,
Commercial Bldg., City.

Dear Sir:

Referring to your letter of February 9th, relative to a copy of a letter to the Blanton Co. on the subject of a
127 trade label "Creamo". You are advised that if I do not receive instructions to the contrary between this date and March 1st, on and after that date, the use of that label will not be allowed. I can not state whether further consideration of this subject would be given by our Bureau if requested; however this subject has been under consideration for some time and I suppose has been referred to our legal department for advice.

Very respectfully:
(Signed) JAS. J. BROUGHAM
Inspector in Charge."

Q Now what were your duties down there, first, Doctor?

A To inspect—inspection and sanitation.

Q What do you do in the way of inspection?

A We see the raw product when it is taken into the house, and we also see the product manufactured, and also see if it is properly marked—marked "United States [Inpsection] and Passed."

Q Who is under you down there?

A At the present time Mr. Stankey.

Q Was he at the time that this letter was written?

A Yes sir.

Q And has been since? A Yes sir.

Q Now after you have inspected these products of this factory what do you do then?

A Why, then we see them packed and see that this mark of inspection is placed on it.

Q Or if the product does not conform to the regulation and the law then what do you do? A If it is unsound we condemn.

Q You notify them to that effect?

128 A Yes, if it is unsound, and we would destroy it for food purposes.

Q If it were unsound? A If it were unsound.

Q Now in the case of the use of this label, you say there in that letter that use of that label would not be allowed. In the event that label had been placed upon the product of the Blanton Company—I mean if the label used by the Blanton Company was not approved by the Secretary of Agriculture what would have been your course?

A We would not allow that product the—

The Court: That is to say the action there on the first of March that you mentioned in that letter?

Mr. Houts: What would have been your duty then on the first of March?

A We would not allow that inspection label to be placed on the package; we would not care about the "creamo", but the "U. S. Inspection and Passed" we would not allow that to be put on.

Q This "U. S. Inspection and Passed" is the Government's stamp? A It is.

The Court: Up to that time you did put that stamp on it?

A Yes sir.

Q And after that time you would not have put the stamp on? A No, sir.

Mr. Houts: Then what would you have done with respect to such a product as was shipped and sold without the label upon it?

A It could be taken out in the State, but if it was shipped out into a State I would put it up to the District Attorney's office.

129 Q You would have reported the facts to the District Attorney's office? A For prosecution.

Q Did you have any intention of prohibiting by physical force in any way the use of that label? A No sir.

Mr. Barclay: We object to that.

The Court: You mean to say take a man there and say not use it?

Mr. Houts: Yes.

The Court: Go on.

Mr. Barclay: We object.

The Court: The question here, as you have understood all the time, is as to whether this concern may continue to use this brand, and if they are permitted to use it, why then the

Government is supposed to do just as before they forbid it, isn't that it?

Mr. Houts: I am trying to show as far as Dr. Brougham and Mr. Stankey are concerned that if this letter of instructions was not conformed to all they could have done would have been to report to me, and they would not have put the "U. S. Inspection and Passed", upon his products.

The Court: Ask the question.

Mr. Houts: Would you have done anything else besides refuse to put the Government stamp "U. S. Inspection and Passed" upon it and report it to me?

A That would have been the extent of my duties.

Q That is all you would have done?

A I would not reported to you unless I had caught a shipment being shipped out interstate.

130 The Court: That is, you would not have had to report to the District Attorney until a shipment intended for an interstate shipment? A Yes sir:

Q And then you would have reported to the District Attorney that this interstate shipment was made by this plaintiff in violation of the regulation of the Department?

A Yes, sir, that is it.

Mr. Houts: That is all.

Cross Examination by Mr. Barclay.

Q Doctor, what is the course, for instance; The inspection would be stopped which had been going in—what would be the course in regard to notifying the transportation companies, your notifying them?

A Why, inspection would not be stopped just on that label alone. That is, if the house stopped inspection you mean?

Q Yes, if the Government should stop it.

A Well, if inspection were taken away from them by the Department then we would notify the transportation companies not to accept their goods for interstate shipment.

Q For interstate business only? A Interstate.

Q It could do business locally but it couldn't consign anything out of the state, is that right? A Yes sir.

Q It would prevent them from shipping goods that had been previously under inspection by the transportation companies outside of Missouri?

A Yes—that is any goods that would be manufactured after inspection was taken away—I say if the Department removed the inspection.

Q If the Department removed the inspection of course
131 they could still ship matter that had been previously inspected and marked, but such matters as afterwards

manufactured and not marked could not be shipped out of the State by the transportation company?

A Not without violating the law.

Q Would it not be part of your duties in connection with the matter of inspection to notify the transportation companies that you had suspended inspection? A Yes.

Q I take it for granted that every step you have taken in the progress of this [mtter] by virtue of this correspondence and your action in regard to the labels—your duties and action have been under the direction of the Bureau of Animal Industry? A Yes, sir.

Q Not upon your own [intiiative] but upon the direction of the Department, is that correct? A Yes, sir.

Q When was the change in the Department of Agriculture —when was the change made there?

A You mean the new law?

Q Under the new law?

A The amendment to the old law was October 30th, 1906.

Q June?

A June, but didn't go into effect until October 30th.

Q Along at that time and in the year 1907 who was the head of the Department of Agriculture at that time?

A Secretary of Agriculture.?

Q Yes. A Mr. Wilson.

Q James Wilson? A Yes.

Q When did he retire from office?

A I think at the beginning of the new administration.

Q 1913? A Yes, sir.

132 Do you know who was the Secretary of the Treasury in 1907, prior to that time?

Mr. Barclay: Does Your Honor remember?

The Court: Leslie M. Shaw.

Mr. Barclay: Does Your Honor remember when he went out?

The Court: I could not say.

Mr. Barclay: Cortelyou became Secretary of the Treasury on the 4th of March, 1904.

The Court: I think Shaw resigned in 1906.

Mr. Barclay: We ask Your Honor to take judicial notice of whatever that change was.

Mr. Barclay: Of course, you did not communicate to Mr. Blanton what the Government's purpose was when that letter was sent, you just sent that letter without any further—

The Witness: I beg your pardon.

Mr. Barclay: I say there was no communication to Mr. Blanton of what the Government intended to do when he got that letter?

A Why, Mr. Blanton got the letter direct from the Department and I only received a copy.

Mr. Barclay: That is all.

Re-Direct Examination by Mr. Houts.

Q Doctor, were there any orders issued that you know of to the effect that inspection was to be removed from the Blanton Company's plant if they continued that label after March 1st? A No, sir, no intention at all.

Q When you say you would notify the transportation companies that to accept interstate shipment when inspec-
133 tion was removed from a plant, you mean when inspection was entirely removed? A Entirely taken away.

Q Your statement does not apply to such a condition as would have existed down there after March 1st?

A No, sir, not at all.

Re-Cross Examination by Mr. Barclay.

Q Am I wrong in supposing that the intent was—to understand on your previous examination that if they had not complied with these orders that you would have [revmoved] the inspection?

A No, sir; we would remove that inspection sign "U. S. Inspection and Passed".

The Court: That is you would refuse to pass it out?

Mr. Barclay: You would refuse to pass it out?

A No. They could take that out in the State and sell it.

Q It would [effect] interstate shipments?

A Well, that would be up to him. If he wanted to follow the law—

Q You would not have physically interfered? A No, sir.

The Court: You would not have put the inspection on it by the Department?

A No, sir.

Q What would you do?

A We would take that part off, that would be removed from that label. As far as the rest of the label is concerned I would not have anything to do with it. All my duty is if they do not comply with the law, if the product is sound and wholesome, I merely refuse to grant it.

Mr. Barclay: That is, you would refuse to put the Government's stamp of inspection on?

A Yes, sir.

134 You would expect him to remove that part of the label —or your representative would remove that part of the label which said it had been inspected by the Government?

A Yes, sir.

Q And so after that was done it would not be legal to ship it out of the State is that right? A Yes, sir.

Q And you only notified the [transportations] companies of that withdrawal of inspection?

A Not unless the inspection was taken away from the plant by the Secretary of Agriculture.

Q Would you leave the inspector there when he had nothing to inspect? A Why he has other brands there.

Q He would go along with the other brands but would not be allowed to—the suspension of the inspection would apply to the Creamo brand, is that right? A Yes, sir.

Q And the other inspection, if it was proper and regular would go on? A Go on.

Q But as far as the "Creamo" brand is concerned, of course— A I would have to refuse to grant it.

Q Take it off? A Yes, sir.

Mr. Barclay: That is all, Doctor.

Mr. Houts: Now, if Your Honor please, I offer these defendant's Exhibits Nos. 1 and 2 in evidence; also defendant's Exhibit No. 3; also defendant's Exhibit No. 4, defendant's Exhibit No. 5 and defendant's Exhibit No. 6, the latter four are letters which have been identified and read to Your Honor.

Said exhibits offered and admitted in evidence are in words and figures as follows, to-wit:

135 Defendant's Exhibit No. 1.

Blanton. Quality.
B
Quality. Blanton.
The Blanton Co.
St. Louis
Creamo
Oleomargarine

Not made in a packing-house but in a special plant designed and completely equipped with every modern appliance for producing high grade goods. Rigid inspection, and the most perfect scientific sanitary measures are observed by us at every step. The result is a product combining absolute purity and perfect uniformity.

This product is sealed immediately after churning in this air-tight, odor-proof package, protecting it from odors and other influences detrimental to purity, quality and sweetness.

After opening package keep in cool, sweet place, away from fruits and vegetables and all contaminating odors.

U. S. Inspected and passed under the Act of Congress, June 30, 1906. Establishment No. 668.

Admirably adapted to table use because of absolute purity and strict uniformity. Better than ordinary butter for cooking and baking, and effects a large saving in cost. Makes delicious cake, and delicate, crisp pastry. Ten to twelve ounces does the work of a pound of butter.

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136 On the end of the carton:

—Not made in a packinghouse—
Blanton. Quality.
B
Quality. Blanton.
—The Blanton Company, St. Louis—

On the end of the carton scratched out:

Approved:
Bureau of Animal Industry
÷ Feb 27 1912 ÷
W K S

Defendant's Exhibit No. 2.

Creamo Brand
Reg. U. S. Pat. Off.

Blanton. Quality.
contains cream B
Quality. Blanton.

Oleomargarine
U. S. Inspected and Passed under the Act of Congress, June 30th, 1906. Establishment No. 668.
Produced by
The Blanton Company
St. Louis, U. S. A.

Defendant's Exhibit No. 3.

"FWM/RDR Y-11
May 31, 1913.

The Blanton Company,
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 20th inst., relative to the inclosed sketch of wrapper, "Creamo Brand Oleomargarine,"

85

"Contains no Cream", submitted for establishment 668 you are advised that the words, "Creamo Brand Oleomargarine", should be in the same size and style of lettering. In addition to this, it will be necessary that the following statements be omitted, since they are either misleading within the meaning of section 11, Regulation 18, or are questionable:
137 "Absolute Purity", "Better than ordinary butter for cooking and baking", "Ten to twelve ounces does the work of a pound of butter", "Air Tight".

Approval is withheld pending receipt of sketches, corrected to conform to Bureau requirements.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION.

Inclosure 611."

Defendants Exhibit No. 4.

FWM/S "Y-11
The Blanton Company, June 20, 1913.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 7th instant, and previous correspondence relative to the use of the word "Creamo", in connection with oleomargarine prepared at establishment 668, you are advised that oleomargarine containing not less than 10 per cent cream, may be labeled, "Creamo Brand Oleomargarine." These words should appear in uniform size and style of lettering.

Very respectfully,
CHIEF, MEAT [INPSECTION] DIVISION."

Defendant's Exhibit No. 5.

"FWM/G Y-8.133
The Blanton Company, October 27, 1913.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 15th instant making inquiry as to whether oleomargarine containing not less than ten per cent of cream may be labeled "Creamo" without the addition of the word "brand", provided same is accompanied by a statement to the effect that "Creamo" is a patented
138 trade mark, you are advised that the Bureau will insist that if the word "Creamo" is used same be followed by the word "brand" in the same size and style of lettering.

Very respectfully,
CHIEF, MEAT INSPECTION DIVISION."

"FWM-ECH Y-8.133
The Blanton Company, Jan. 31, 1914.
St. Louis, Mo.
Gentlemen:

Referring to your letter of the 24th ultimo relative to the inclosed sketches of labels submitted for Est. 668, you are advised that these sketches are disapproved inasmuch as the word "Brand" is either omitted or appears in such location or size and style of lettering that it does not modify the term "Creamo". In no instance does the word "Oleomargarine" appear in lettering similar to the balance of the name. As indicated in previous correspondence it will be necessary if the word "Creamo" is used in connection with oleomargarine that the same be followed by the words "Brand" and "Oleomargarine" and the statement "Creamo Brand Oleomargarine" appear in uniform size, style, and color of lettering. If the product contains no cream it will be necessary that there appear in direct connection with the name the statement "Contains no cream." If cream is used in quantities not less than ten per cent, the name "Creamo Brand Oleomargarine" need not be further modified.

With reference to the statement "Over ten per cent
139 cream" you are advised that exception is taken to the word "Over" in this statement, this being too indefinite and therefore misleading. The Bureau will offer no objection to the exact percentage of cream being stated on the label in connection with the name "Creamo Brand Oleomargarine."

Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and accompanied by information relative to the percentages of the various ingredients to be employed in the preparation of the products for which the labels are intended.

In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is to-day being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number.

Very respectfully,
ACTING CHIEF OF BUREAU."

The Court: Doctor, since the first of March what has been your course with reference to this Creamo Oleomargarine?

A It goes right along.

Q You have been endorsing it as you did before the first of March? A Yes, sir.

Q That is, stamping it by the Government's stamp?
A Yes, sir.

140 Mr. Barclay: That is under the order of Your Honor.

The Court: Well, I say that has been the course you have pursued?

The Witness: Yes, sir.

Mr. Houts: That is all the testimony I have to offer.

Defendant Rests.

The Court: Anything further on the other side?

(Testimony for Plaintiff in Rebuttal.)

DAVID A. BLANTON,

being recalled in rebuttal, testified as follows:

Direct Examination by Mr. Barclay.

Q Mr. Blanton, you are acquainted, of course, with the forms of manufacture of oleomargarine, I suppose? A I am.

Q Can oleomargarine be made without coming within the terms of Section 8 that has been read here—this meat inspection law?

A Oleomargarine can be made and is made very extensively without the use of animal fat whatever. The largest factory producing oleomargarine in the world produces a strictly vegetable oleomargarine without any animal fat whatever.

Q Did you have any notice other than this letter as to what the Government's purpose was to do at the expiration of this time limit? A Did I have any other letters?

Q I say did you have any other information other than this letter as to the purpose of what the Government intended to do when your limit ran out for the use of the Creamo

141 Oleomargarine label?

A That letter I took to be final and was the only qualifying decision that I had, and I immediately submitted it to you as being the final outcome of my negotiations with the Department.

Mr. Barclay: That is all.

Mr. Houts: That is the case, Your Honor.

The above was all the testimony offered.

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142 (Recital of Finding of Issues for Plaintiff, of Entry of Final Decree, etc., and of Orders extending Time to file Bill of Exceptions.)

Thereupon the Court took the case under advisement until the 27th day of April, 1914, and on that day found the issues in favor of the plaintiff.

Thereafter, and on the 13th day of May, 1914, the Court entered a final decree in favor of the plaintiff.

To which finding and entry of decree, the defendants, by counsel, duly excepted then and there at the time.

Thereafter, and on the 19th day of September, 1914, and during the March Term, 1914, of said Court, the Court by an order entered of record granted the defendants James J. Brougham and Arthur N. Stankey until the 20th day of November, 1914, in which to file their Bill of Exceptions in this cause, and continued the case until the September Term, 1914, of said court.

Thereafter, and on the 19th day of October, 1914, the defendants James J. Brougham and Arthur N. Stankey filed in said Court their assignment of errors and petition for appeal, and on said date an appeal was duly allowed them by said court to the United States Circuit Court of Appeals for the Eighth Circuit.

Thereafter, and on the 10th day of November, 1914, the Court by an order duly entered of record granted said defendants until the 15th day of January, 1915, in which to file their Bill of Exceptions in this cause.

Thereafter, and on the 13th day of January, 1915, the Court by an order duly entered of record granted the defendants James J. Brougham and Arthur N. Stankey until the 15th day of March, 1915, in which to file their Bill of Exceptions in this cause.

143 Thereafter, and on the 10th day of March, 1915, the Court by an order duly entered of record granted the defendants James J. Brougham and Arthur N. Stankey, until the 15th day of April, 1915, in which to file their bill of exceptions in this cause.

And within the extended time there was successively further extensions of such time allowed and recorded, as per orders of court as follows: (Hereinbefore inserted).

And within the extended time allowed as aforesaid, defendants present this their bill of exceptions.

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144 (Certificate of Judge to Bill of Exceptions.)

Now on this 22nd day of June, 1915, and within the time allowed by the Court therefor, the defendants James J. Brougham and Arthur N. Stankey present this their Bill of Exceptions in this cause which is now by the Court allowed, signed, sealed, filed and made a part of this cause. All of which is allowed and done at St. Louis, Missouri, this 22nd day of June, 1915.

DAVID P. DYER

Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, and the Judge who tried said cause.

June 21, 1915.

We have no objection to the foregoing bill being signed:—

BARCLAY, ORTHWEIN & WALLACE,
Solicitors for Pltf.

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145 (Clerk's Certificate to Transcript.)

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

I, W. W. Nall, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in cause No. 4262, of The Blanton Manufacturing Company, plaintiff, versus James J. Brougham, Arthur N. Stankey, et al, Defendants, together with all things of and concerning the same, as fully as the same remains on file and of record in said cause in my office, and that the original Citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my hand and affix the seal of said District Court, at office, in the City of St. Louis, in said Division and District this 30th day of September, A. D. 1915.

W. W. NALL,
Clerk of said Court.
By IRVINE MITCHELL,
Deputy Clerk.

(Seal)

Filed Oct 1 1915
John D. Jordan Clerk

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91 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of counsel for appellants.

United States Circuit Court of Appeals, Eighth Circuit.

JAMES L. BROUGHAM, et al., Appellants.
vs.
BLANTON MANUFACTURING COMPANY. } No. 4584.

The clerk will enter my appearance as counsel for the appellants.

ARTHUR L. OLIVER
and
VANCE J. HIGGS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 15, 1915.

Appearance of counsel for appellee.

The clerk will enter our appearance as counsel for the appellee in said cause.

SHEPARD BARCLAY.

DECEMBER 31, 1915.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 7, 1916.

Order of argument.

December Term, 1916. Monday, December 4, 1916.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Arthur L. Oliver for appellants and continued by Mr. Shepard Barclay for appellee, and the
92 hour for adjournment having arrived further argument is postponed until to-morrow.

Order of submission.

December Term, 1916. Tuesday, December 5, 1916.

This cause having been called for further hearing, argument was resumed by Mr. Shepard Barclay for appellee and concluded by Mr. Arthur L. Oliver for appellants.

Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

93 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 4584.—May Term, A. D. 1917.

JAMES J. BROUGHAM and ARTHUR N. Stankey, Appellants,	Appeal from the District Court of the United States for the Eastern District of Missouri.
BLANTON MANUFACTURING COMPANY, Appelle.	

Mr. Arthur L. Oliver, United States Attorney, for appellants.

Mr. Shepard Barclay (Mr. S. Mayner Wallace on the brief), for appellee.

Before Sanborn and Smith, circuit judges, and Amidon, district judge.

SMITH, *Circuit Judge*, delivered the opinion of the Court.

The Meinecike-Blanton Manufacturing Company commenced the manufacture of oleomargarine about 1902. It adopted the trade-mark "Creamo Oleomargarine" for its goods about 1904. It was succeeded by the appellee, the Blanton Manufacturing Company. August 2, 1886, 24 Stats. 209, Congress passed a law imposing a tax of six hundred dollars a year upon all manufacturers of oleomargarine. On May 9, 1902, Congress greatly elaborated this law, 32 Stats. 193, U. S. Compiled Stats. 1916, § 5977. Section 6 of the act, 24 Stats. 209, 210, contained the following:

"SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall
94 prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages."

The plantiff's brand was approved by the Commisssioner of Internal Revenue January 19, 1904, and prior to the enactment of the meat inspection law or the pure food law. The label in question has always remained thus approved. On June 30, 1906, Congress passed both the meat inspection law, 34 Stats. 669, 674, and the pure food law, 34 Stats. 768. On April 4, 1907, the Department of Agriculture having taken charge of the inspection of the oleomargarine factory of the Blanton Manufacturing Company under the claim that its oleomargarine was a meat-food product, the Secretary of Agriculture approved the labels on the packages then in use under the trade name "Creamo Oleomargarine." On January 6, 1908, the complaintant made application to register the trade-mark "Creamo

Oleomargarine" in the United States Patent Office. This registration was allowed on January 9, 1908. The Blanton Manufacturing Company continued for years to sell its goods under this label with the express approval or acquiescence of the Treasury and Agricultural Departments. On July 8, 1912, the defendant was expressly officially notified of the approval of the trade label "Creamo Oleomargarine" by the Agricultural Department. For many years the company has spent an average of seven thousand five hundred dollars a year in advertising the commodity under this name and in the past ten years has spent seventy-five thousand dollars in that way but the Department commenced to complain in about 1912 of the use of the word "Creamo." Up to that time the Blanton Manufacturing Company had spent between thirty-five and forty thousand dollars in such advertising. On October 2, 1912, the Chief of the Bureau of Animal Industry wrote the Blanton Manufacturing Company that the use of "Creamo" was considered deceptive and misleading and the Bureau must therefore decline to continue permitting the use of this name in connection with oleomargarine. The letter recited that the Bureau's approval of the use of this name was formerly given. On February 10, 1914, the Inspector in Charge at St. Louis notified the Blanton Manufacturing Company that on and after March 1, 1914, "the use of that label will not be allowed." Thereupon the Blanton Manufacturing Company brought suit in the court below against Dr. James J. Brougham, Chief Inspector in the
95 City of St. Louis of the Bureau of Animal Industry of the Department of Agriculture, Arthur N. Stankey, local inspector of said bureau in charge of the inspection at the manufacturing plant of the Blanton Manufacturing Company, Dr. Alonzo D. Melvin, chief of said bureau, and Honorable David F. Houston, Secretary of Agriculture of the United States, praying that this,

"Court may grant to plaintiff a writ of injunction * * * perpetually enjoining and restraining said defendants from interfering with the use and enjoyment by plaintiff (in interstate commerce or otherwise) of its said trade-mark 'Creamo' Oleomargarine upon its labels now in use in its said business as above described, and from attempting to deprive plaintiff of the use thereof,"

and for general equitable relief. Dr. Brougham and Arthur N. Stankey were served with process and filed answer but the Secretary of Agriculture and the Chief of the Bureau of Animal Industry were not found in the District and did not appear. The case was tried upon the issues joined as between the complainant and Messrs. Brougham and Stankey and the court found the issues in favor of the plaintiff and enjoined Dr. James J. Brougham and Arthur N. Stankey, their agents, successors, and employes, from interfering with the use and enjoyment by the plaintiff, its successors and assigns, in interstate commerce and otherwise of the said trade-mark "Creamo" upon stencils and labels as theretofore approved and used on packages of various sizes for the sale of oleomargarine, and Messrs. Brougham and Stankey appeal.

It is first contended by the appellant that no injunction could rightly have been granted against the appellants because such an injunction could not have been properly granted against the Secretary of Agriculture.

In St. Louis Independent Packing Company *v.* Hon. David F. Houston, ——— C. C. A. ———, ——— Fed. ———, we recently had occasion to fully examine this question and following that case we hold that this injunction could properly have issued against the Secretary of Agriculture had he been served or appeared and he not being within the jurisdiction of the court but having his subordinates there who, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them.

96 The plaintiff first insists that its business is governed wholly by the oleomargarine law, 24 Stats., 209; 32 Stats., 193, and that neither the Secretary of Agriculture nor the Bureau of Animal Industry has under the meat-inspection law any power or control over the complainant's business.

The oleomargarine law was enacted under the power of Congress, Constitution, Art. 1, Sec. 8, Par. 1:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises,"

while the meat-inspection law and the pure-food law were enacted under the power conferred by the Constitution, Art. 1, Sec. 8, Par. 3,

"To regulate commerce with foreign nations, and among the several States and with the Indian tribes;"

Whatever may have been the ulterior purpose in the passage of the oleomargarine law it can not be held that anything in it tended to subtract any power subsequently conferred on the Secretary of Agriculture under the meat-inspection law or upon the Secretary of the Treasury, the Secretary of Agriculture, or the Secretary of Commerce and Labor under the pure-food law.

The first, the oleomargarine law, was enacted in the exercise of the taxing power and this could not prevent Congress under the power to regulate commerce enacting the pure-food law and the meat-inspection law in the interest of the public health or welfare.

The meat-inspection law, in what may be called the preamble, 34 Stats., 669, 674, declares that it is enacted for the purpose of preventing the use in interstate or foreign commerce as hereinafter provided of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, and further provides, page 675,

"That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat canning, salting, packing, rendering, or similar establishment," and provides for marking the same "Inspected and Passed" or "Inspected and Condemned" and the consequences. Meat food

97 products were not more definitely defined and the Secretary of Agriculture in July, 1910, secured the opinion of the Attorney General as to the true definition, 28 Op. Atty. Gen., 369.

It is provided in the meat-inspection law, 34 Stats., 678,

"Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

The Attorney General first having held that the term "similar establishments" as used in the law was intended to include all establishments that were not specially mentioned in which the animal is slaughtered or the carcasses or meat are prepared or in which the meat food product is manufactured then held that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal and that the determination of the meaning of the term "meat food product" is essential to the proper enforcement of the meat-inspection law and as Congress has not defined the term and it has no well defined meaning but is one of common use and Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the act the power to determine what manufactures are meat food products rests in the Secretary of Agriculture subject to the restriction that the definition of the term adopted be not clearly or unquestionably outside the intent of the act. It may not be without importance to state that the opinion was delivered in a case of a compound which consisted of 80% cottonseed oil, clearly not a meat food product, and 20% of oleo stearin, a meat food product. There is no evidence that oleomargarine is not a meat food product, and we regard it as a matter of common knowledge that it is such a product, and clearly, therefore, its manufacture comes within the language of the meat-inspection law.

The meat-inspection law, 34 Stats., 676, provides:

"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established
98 trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

We are not desirous of deciding more than is before us and must pass upon the question whether the Department of Agriculture could pass upon and approve a trade name under this last statute, which we find "Creamo Oleomargarine" was and is, and approve it in 1907 and again in 1912 and later after an established business had been built up under that name and a vast sum of money expended in the business, with or without evidence, change its ruling and refuse to allow the use of the trade name.

It is not claimed, as we understand it, that the public was deceived by the use of the name "Creamo Oleomargarine." The use of it is objected to upon its similarity to the word "cream" and upon the assumption that some of the public may be deceived into believing that cream is contained in the oleomargarine. The word is not "cream" but "Creamo." It is a rule that words merely descriptive cannot constitute a trade-mark because descriptive words cannot be expressly appropriated and that it is essential to a valid technical trade-mark that the words or phrases be used in a purely arbitrary or fanciful way as applied to the goods in question. "Creamo" is not a word in common use among English-speaking people but is such a fanciful word used by the complainant. But even if the term had been "Cream Of" it would not be objectionable as a brand upon manufactured goods. There is a well-known brand of cigars known as "Cremo Cigars." "Cream of Wheat" is a brand used for breakfast food and "Cream Baking Powder" is a well-known brand of that article. No one has ever assumed there is any cream in the cigar, in the Cream of Wheat or in the Cream Baking Powder.

Could the Department of Agriculture approve the use of the label "Creamo Oleomargarine" as provided in the meat-inspection law and then after a trade had been built up and extended under that name and vast sums of money expended in advertising it change its ruling and forbid its use unless 10%, for instance, of cream was used in the manufacture? We are constrained to say that we do not think any such power was vested in the Secretary of Agriculture.

The decree of the District Court was right and it is affirmed.

Filed May 14, 1917.

99 AMIDON, *District Judge*, dissenting.

I take the facts from the testimony of Mr. Blanton, president of the plaintiff company, below. They are uncontroverted. When the name, "Creamo," was selected, plaintiff was using thirty per cent of cream in its product. The name was chosen to indicate to the consumer and to the trade that cream was used in producing plaintiff's oleomargarine. The fact is that plaintiff sometimes uses cream, sometimes it uses no cream, and sometimes it uses skim milk. Whatever the practice the product is all sold under the name Creamo Oleomargarine. At the same time that the name here involved was chosen plaintiff had another brand of oleomargarine which it marked "Fulcreme" and another one "Extracreme." These were used continuously until they were withdrawn in 1912 by order of the department. Plaintiff's letterhead, used generally in its business, states with a conspicuousness which can not easily be reproduced that the Blanton Company are "churners of Creamo, the only full cream Butterine." These are a few of the conspicuous features of the evidence showing that plaintiff has habitually represented that cream is used in its product. It is also plain that to induce that belief is a decided trade advantage. It is conceded by plaintiff that the representation is false. The name "Creamo" was chosen as a part of this decep-

tion. Mr. Blanton himself testifies with emphasis that the name was chosen to convince the consumer and the trade that cream was an important element in the production of his company's product. As that product is conceded sometimes to contain no cream and sometimes to be made by the use of skim milk, the name is false and deceptive. The proof is further emphasized by the fact that plaintiff in its negotiations with the department refused to add to its label the statement, "contains no cream," or a statement of the percentage of cream used. It is stated that the word "Creamo" is a fancy word and will be so understood. That it seems to me is to indulge in one of the simplest of logical fallacies. Like most words in the language cream has a figurative and a literal meaning. It may signify excellence of quality or it may mean the part of milk that comes to the surface. When the term is applied to a cigar or a breakfast food it is plain enough that it is used in its figurative sense. It will not cause anybody to believe that cream is used in making the cigar or the cereal. How stands the matter in the case of oleomargarine? It has been one of the trade frauds from the time that article was invented to palm it off as a dairy product. The States and the National
100 Government have been engaged for more than a generation in trying to defeat that trade deception. To create the belief that cream is used in the production of oleomargarine has been a part of the fraud. Mr. Blanton is a "practical" man. He probably knew what he was doing when he selected the word "Creamo." He says he chose it to make the consumer and the trade believe that cream was used in the production of his article. To say that the term "cream" will not deceive when it is applied to oleomargarine because it does not deceive when applied to a cigar seems too manifest a fallacy to require answer. As a matter of fact, therefore, I do not see how a plainer demonstration could be made that a trade name is false and deceptive than has been made in this case.

I hesitate, however, to go into this subject, for in my judgment it is committed exclusively to the Secretary of Agriculture by the statute which is quoted in the majority opinion. I am at a loss to harmonize the opinion in this case and that rendered in the recent case of St. Louis Independent Packing Co. *v.* Houston, with the uniform practice of this court and of the Supreme Court, in holding that decisions of the Postmaster General and the Secretary of the Interior on questions of fact are conclusive. Acting upon that principle the decisions of the Land Department and of the Post Office, determining questions of fact in the disposition of the public lands, and in passing upon what forms of business are fraudulent so as to subject them to a fraud order, we have uniformly held that the decisions of those departments are binding upon the courts, and have refused to enter upon any review of their decisions although the gravest interests were involved and the most serious charges of mistake and sometimes of fraud were made. The general rule was stated

by the Supreme Court, upon a full review of the authorities, in Bates & Guild Co. *v.* Payne, 194 U. S., 406, 409, as follows:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of correctness and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

101 The doctrine of this court and the Supreme Court on this subject is so axiomatic as to make the citation of authorities unnecessary. Why should not the same rule be applied to the Secretary of Agriculture while enforcing the meat products act? The jurisdiction is the same. The law in plain terms commits to that officer to determine when a trade name is false and deceptive; and yet in this case, and in the other case to which I have referred, this court exercises a power to review his decision which would hardly be exercised in reviewing the findings of a master in chancery. I myself am unable to assign any reason for this variety of practice as between the Postmaster General and the Secretary of the Interior on the one hand and the Secretary of Agriculture on the other, and can find none in the opinion in this case or in the other case.

The opinion in the present case seems to be based mainly upon the ground that the name "Creamo Oleomargine" had been approved by the department in 1908 and in 1912, and plaintiff has expended money in advertising the name, and it is indicated that these facts deprive the department of the power to forbid the use of the name although satisfied that it is false and deceptive. That, it seems to me, is a doctrine fraught with the gravest danger. It has been uniformly held that even the most solemn acts of legislation pursuant to which parties have invested large sums of money, can in no way impair the authority of the State to exercise its police power. Fertilizing Company *v.* Hyde Park, 97 U. S., 659; Texas & N. O. Railroad Co. *v.* Miller, 221 U. S., 408, 414, are cases in which this familiar rule is cited and applied. Can it be possible, then, that a mere executive officer by his mistake, honest or corrupt, can destroy within the field of his jurisdiction a police statute of the Nation? It has been the uniform holding of the courts that the conduct of such officers can not impair the rights of the Government even in civil matters. United States *v.* Pine River Logging & Improvement Co., 89 Fed., 907, 917; United States *v.* Lee Wilson Co., 214 Fed., 630, 651. It seems to me too plain for debate that an executive officer appointed to enforce a statute can not by any act or omission of his impair the power of the Government through a subsequent officer to enforce a police statute. To hold otherwise is to give such officers the power to annul the law. It might well happen that the use of a name at the time of its selection, and even for years thereafter, would appear

to be innocent, and would be approved in the routine course
102 of administrative business; then upon a careful investigation it would be found that the name was chosen and was actually used in the channels of trade for false and deceptive purposes. That seems to be what has occurred in the present case. It seems to me an alarming doctrine that the approval of a name which was in effect selected for purposes of deception can destroy the power of the Government to stop the fraud. Some point is made in the brief that the plaintiff has a registered trade-mark for the term "Creamo Oleomargarine." This seems to have troubled the department in dealing with the name. It is, however, settled law that a trade-mark that is chosen for fraudulent purposes will not be protected even in civil litigation; much less can such a trade-mark be used to impair the power of the Government to enforce a police statute.

In my judgment both on the law and the facts the decree made by the trial court was conspicuously improper and should be reversed.

Filed May 14, 1917.

103 *Decree.*

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1917. Monday, May 14, 1917.

JAMES L. BROUGHAM AND ARTHUR N. STANKEY, Appellants, *vs.* BLANTON MANUFACTURING COMPANY. } No 4584.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

MAY 14, 1917.

Petition for appeal to Supreme Court, U. S.

The above-named defendants, James J. Brougham and Arthur N. Stankey, conceiving themselves aggrieved by the final judgment and decree entered on May 14, 1917, in the above-entitled proceeding, reversing the order of the district court dismissing complainant's bill and ordering that a decree be entered conforming to complainant's prayer, do hereby appeal from said judgment and decree to the

Supreme Court of the United States, and pray that this, their appeal, may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

104 ARTHUR L. OLIVER.
United States Attorney for defendants and appellants, James J. Brougham and Arthur N. Stankey.

Dated this 2nd day of August, A. D. 1917.
(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 3, 1917.

Assignment of errors on appeal to Supreme Court, U. S.

Now come James J. Brougham and Arthur N. Stankey, appellants, and make and file this their assignment of errors:

First. The court erred in its holding and finding that the said defendants and their agents, successors, and employes, jointly and severally, ought to be perpetually enjoined and restrained from interfering with the use and enjoyment by the plaintiff and its successors and assigns of the alleged trade-mark "Cremo" upon stencils and labels as heretofore approved and used on packages of various sizes for the sale of oleomargarine and substantially as described in plaintiff's bill of complaint and in the final decree of the court herein.

Second. The court erred in holding, finding, and decreeing that said defendants, Brougham and Stankey, and their agents, successors, and employes, be perpetually enjoined and restrained from attempting to deprive plaintiff and its successors and assigns of the use of said alleged brand, trade-mark, and label described in said bill of complaint herein, used upon packages of oleomargarine manufactured, packed, sold, or offered for sale by the plaintiff and its agents, successors, assigns, or customers in the prosecution or course of business then conducted by plaintiff as manufacturer and vendor of oleomargarine.

105 Third. The court erred in holding, finding, and decreeing that the plaintiff was entitled to the relief prayed for in its bill of complaint and in entering a judgment and decree awarding to plaintiff such relief so prayed for.

Fourth. The court erred in entering a decree for the plaintiff.

Fifth. The court erred in holding and finding that the name or brand "Cremo" oleomargarine used by plaintiff was and is a trade-mark.

Sixth. The court erred in holding and find that the brand and label described and set forth in the bill of complaint was officially approved by the Bureau of Animal Industry, and that for more than five years complainant used said label upon its products without objection upon the part of the proper officers of the Government and with their approval.

Seventh. The court erred in holding and finding that the plaintiff had a right to use a trade name, to wit, "Creamo Oleomargarine," without the approval of the Secretary of Agriculture.

Eighth. The court erred in holding and finding that the plaintiff had a right to use the name "Creamo" upon its oleomargarine without the approval of the Secretary of Agriculture.

Ninth. The court erred in holding and finding that the defendants, Brougham and Stankey, were not authorized and empowered to withhold from oleomargarine produced by plaintiff and labeled and branded "Creamo Oleomargarine" the stamp or mark "Inspected and Passed" when said name "Creamo Oleomargarine" did not have the approval of the Secretary of Agriculture.

Tenth. The court erred in holding and finding that it would be inequitable upon the part of the Government and its officers to stand by, approve, and acquiesce in this brand for five or six years and then, at great loss to the complainant, refuse further to let its product be sold under this same brand.

106 Eleventh. The court erred in holding and finding that these defendants, Brougham and Stankey, were not authorized and empowered to enforce the rules and regulations adopted and approved by the Secretary of Agriculture and the officers of the Bureau of Animal Industry of the Department of Agriculture which related and pertained to the oleomargarine produced by plaintiff and referred to in its petition.

Twelfth. The court erred in holding and finding that the complainant was entitled to the relief prayed for in its bill and in entering a judgment in accordance therewith.

Thirteenth. The court erred in not entering a judgment and decree in favor of the defendants.

Fourteenth. The court erred in admitting and considering incompetent, immaterial, and irrelevant evidence and in basing its finding and decree thereon.

ARTHUR L. OLIVER,
United States Attorney for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 3, 1917.

Order allowing appeal to Supreme Court, U. S.

Now come defendants in the above-entitled cause, by their solicitor, and file and present to the court their assignment of errors and their petition for an appeal from the final judgment and decree ordering that a decree be entered in conformity with the prayer in complainant's bill rendered herein on May 14, 1917, to the Supreme Court of the United States; on due consideration whereof it is:

Ordered that said appeal be granted as prayed.

WALTER I. SMITH,
Circuit Judge.

107 (Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 6, 1917.

108 UNITED STATES OF AMERICA, *ss.*

To Blanton Manufacturing Company, or S. Mayner Wallace, and Shepard Barclay, its attorneys of record, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein James J. Brougham and Arthur N. Stankey are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Walter I. Smith, circuit judge of the United States Circuit Court of Appeals, Eighth Circuit, this 4th day of August, in the year of our Lord one thousand nine hundred and seventeen.

WALTER I. SMITH.
Circuit Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Service of the above citation acknowledged this 7th day of August, A. D. 1917

S. MAYNER WALLACE.
SHEPARD BARCLAY,
Attorneys for Appellee.

(Indorsed:) No. 4584. James J. Brougham et al., appellants, vs. Blanton Manufacturing Co. Citation on appeal to Supreme Court U. S. Filed Aug. 8, 1917. E. E. Koch, clerk.

109 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein James J. Brougham and Arthur N. Stankey were appellants, and the Blanton Manufacturing Company was appellee, No. 4584, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-fourth day of July, A. D. 1917, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the [SEAL.] Eighth Circuit, at office in the city of St. Louis, Missouri, this ninth day of August, A. D. 1917.

E. E. KOCH.

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed on cover:) File No. 26096. U. S. Circuit Court Appeals, Eighth Circuit. Term No. 629. James J. Brougham and Arthur N. Stankey, appellant, vs. Blanton Manufacturing Company, Filed August 16th, 1917. File No. 26096.